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No.

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

NEXTWAVE PERSONAL COMMUNICATIONS INC. AND NEXTWAVE POWER PARTNERS INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI (VOLUME II)

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APPENDIX H

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Bankruptcy No. 98 B 21529(ASH)
Adversary No. 98-5178A

IN RE NEXTWAVE PERSONAL COMMUNICATIONS, INC., ET AL., DEBTORS

NEXTWAVE PERSONAL COMMUNICATIONS, INC., PLAINTIFF

v.

FEDERAL COMMUNICATIONS COMMISSION, DEFENDANT

June 22, 1999

DECISION ON REMEDY

ADLAI S. HARDIN, JR., Bankruptcy Judge.

On May 12, 1999 this Court issued its decision (the "May 12 Decision") after trial on the merits of the constructive fraudulent conveyance claim asserted by plaintiff-debtor NextWave Personal Communications, Inc. ("NPCI") against defendant Federal Communications Commission ("FCC"). The Court left open the question of remedy and sought further illumination of the parties' positions in light of the ruling on the merits.

To avoid unnecessary repetition, this Decision on Remedy shall be deemed a supplement to and a part of

the May 12 Decision. Having ruled on the issue at the May 26 hearing on remedy and signed an order and judgment granting the remedy sought by NPCI, the purpose of this Decision is to set forth the grounds for the ruling.

Positions of the Parties

NPCI

NPCI's position is based upon the words of the statute. Section 544 of the Bankruptcy Code, upon which the claim is based, states that "[t]he trustee may avoid . . . any obligation incurred by the debtor that is voidable under applicable law. . . ." NPCI points out that, unlike other provisions of the Bankruptcy Code (*e.g.*, Sections 106(a)(2), (3), 305(a), 1109(b)), which provide that the "court may" or a "party in interest may" do thus and so, the election to avoid a constructively fraudulent transfer is specifically delegated to "the trustee." As debtor-in-possession with all the rights of a trustee under Section 1107, NPCI has requested and states that it is entitled to the avoidance remedy provided by the statute. In addition, NPCI argues that the avoidance remedy is consistent with the objectives of both the Bankruptcy Code and Section 309(j) of the Federal Communications Act. Referring to the overarching bankruptcy policy favoring reorganization, NPCI stresses that avoidance of the obligation is vital to NPCI's reorganization.

The literal terms of Section 544 (as well as Section 548 and California Civil Code § 3439.07) appear to call for avoidance of the entire obligation where the statutory criteria for avoidance are met. Recognizing that avoidance of the entire obligation would be inappropriate in many cases, particularly where a constructively fraudulent transaction is at issue and the claim is not based upon any element of bad faith on the part of the obligee, NPCI asserts that the FCC should be entitled to a claim in the amount of $1,023,211,000 representing the value conferred as found in the May 12 Decision. NPCI has already paid $474,364,806, leaving a balance due of $548,846,194 to be paid in accordance with the installment provisions of the FCC regulations.

As a practical matter this remedy results in avoidance of the $3,720,437,000 portion (the "Fraudulently Incurred Obligation") of NPCI's total bids for its 63 C block licenses which exceeded the combined value of those licenses and the 3% Payment.

FCC

In its Supplemental Memorandum of Law Regarding Remedy, the FCC observes that this case arises at the intersection of the Bankruptcy Code and the Federal Communications Act, and that this Court must give effect to both statutes if possible. To this end, the FCC asserts that:

> [T]he Court must honor two essential principles: (1) as between debtor [NextWave] and the FCC, the entire $4.74 billion C block payment obligation remains valid and is only partially avoidable to the extent necessary to benefit NextWave's *bona fide* creditors; and (2) NextWave cannot retain its 63 C block licenses without satisfying its auction bids in full.

FCC Memo on Remedy at 2. To accomplish these objectives, the FCC concludes its Memorandum on Remedy by asserting that the Court should:

> . . . (1) order NextWave to surrender its 63 C block licenses to the FCC; (2) allow the FCC to retain all of NextWave's down payments in partial satisfaction of its unavoidable claim, or, in the alternative, to retain $142,309,000 in down payments, direct that the remaining $332,055,806 in down payments be paid to NextWave's estate, and permit the FCC to file an unsecured claim against NextWave's estate for any deficiency in its recovery of $1,023,211,000; and (3) subordinate the FCC's claim for the [Fraudulently Incurred Obligation] to the general unsecured claims.

Id. at 13.

Unsure of the meaning and purpose of the FCC's remedial objectives, the Court requested clarification of its position at the May 26 hearing. In explaining its primary objective, the FCC acknowledged or stated among other things:

- Money is not the end goal. . . . Money is not the objective. (5/26/99 Tr. At 30)
- The objective is "[a] fair and efficient allocation of the limited resource of radio spectrum." (*Id.* at 31)
- "The bid amount, as I said, is what ties the whole process back to the statute and brings it to the heart of the regulatory purpose of congress in adopting a competitive bidding system to allocate the limited resources spectrum. It is the bid amount which drives the industry from the prospective [sic] of allocation spectrum. . . . And the FCC . . . has determined that the bid price is paramount to achieve those ends." (*Id.* at 31-32)

Still uncertain of the FCC's primary objective and theory of remedy, the Court asked whether the FCC would seek rescission (*i.e.*, return to the FCC of the 63 licenses and return to NPCI of the $473 million of deposits) as an alternative if the remedy proposed by the FCC were rejected. The FCC responded that its paramount interest is in getting the licenses back, but stressed to the Court that rescission is "not what we seek" (*id.* at 29).

In short, the FCC wants to recover the 63 licenses, keep the $473 million of deposits or, in the alternative, keep the $142,309,000 3% Payment and an unsubordinated "deficiency claim" (*i.e.*, $1,023,211,000 less $142,309,000 less whatever the FCC may receive from its resale of the licenses) and, in addition, retain an allowed claim in NPCI's Chapter 11 case for the entire $3.7 billion Fraudulently Incurred Obligation subordinated to existing, but not future, unsecured creditors and, of course, senior to equity both old and new. Not surprisingly, the FCC cites to no case law supporting this astonishing and novel remedy for constructive fraudulent conveyance, and for the reasons discussed below the Court sees no reason to grant it.

Governing Legal Authorities

This Court's fashioning of a remedy is guided by the canon that statutory interpretation begins with the

language of the statute itself. *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685, 105 S. Ct. 2297, 85 L.Ed.2d 692 (1985). *See also United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240-42, 109 S. Ct. 1026, 103 L.Ed.2d 290 (1989) (a statutory provision that is clear on its face should be given full force and effect); *Central Trust Co. v. Official Creditors' of Geiger Enterprises, Inc.*, 454 U.S. 354, 359-60, 102 S. Ct. 695, 70 L.Ed.2d 542 (quoting *Caminetti v. United States*, 242 U.S. 470, 485, 37 S. Ct. 192, 61 L.Ed. 442 (1917)) ("[i]t is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms").

Section 544(b) of the Bankruptcy Code provides: "The trustee may avoid . . . any obligation incurred by the debtor that is voidable under applicable law. . . ." Section 544(b) incorporates non-bankruptcy law to supplement the trustee's avoiding powers under the Bankruptcy Code. The avoidance powers are intended to promote equitable distribution among creditors by bringing improperly transferred property back into the debtor's estate. *In re Best Products Co., Inc.*, 168 B.R. 35, 57 (Bankr. S.D.N.Y. 1994) ("[f]raudulent transfer laws are intended to promote payment to creditors"). Specifically, Section 544(b) allows the trustee or debtor-in-possession in a case under Chapter 11 to invoke the rights of an existing unsecured creditor to set aside a transaction that is voidable under applicable state law.

An essential element in the exercise of the avoidance powers in Section 544 *et seq.* of the Bankruptcy Code is that the remedy be "for the benefit of *the estate*."

11 U.S.C. § 550(a), emphasis supplied. Section 550 thereby places an equitable restraint on the exercise of avoiding powers. The "estate" comprises all interests, including all creditors and equity. Thus, it might be inappropriate to use the avoiding powers if the benefit accrued only to the equity or to only one creditor or one class of creditors. Under the "benefit of the estate" standard, "what matters is whether creditors will receive 'some benefit from the recovery of the [challenged transfers].'" *In re Kennedy Inn Associates*, 221 B.R. 704, 715 (Bankr. S.D.N.Y. 1998) quoting from *In re Centennial Industries, Inc.*, 12 B.R. 99, 102 (Bankr. S.D.N.Y. 1981). *See also In re Glanz*, 205 B.R. 750, 758 (proper standard is "that recovery by [the debtor] will increase [the debtor's] assets and improve its financial health to the extent that the likelihood is improved of its being able to satisfy its obligations to its creditors under [a] Plan").

Recovery of the avoided transfer is appropriate even if the benefit to the estate is indirect. 5 *Collier on Bankruptcy* ¶ 550.02[2], p. 550-7 (15th ed. 1998). The term "estate" is broader than the term "creditors," *In re Trans World Airlines, Inc.*, 163 B.R. 964, 972 (Bankr. D. Del. 1994), and benefit has been interpreted broadly to include an indirect benefit such as an increase in the probability of a successful reorganization. *See, In re Tennessee Wheel & Rubber Co.* (*Tennessee Wheel & Rubber Co. v. Captron Corp. Air Fleet*), 64 B.R. 721, 725-26 (Bankr. M.D. Tenn. 1986), *aff'd*, 75 B.R. 1 (M.D. Tenn. 1987); *In re Sweetwater*, 884 F.2d 1323, 1326-7 (10th Cir. 1989) (the Tenth Circuit found that if the estate representative appointed pursuant to section 1123(b)(3)(B) realized more cash from the fund's assets than the allowed amount of administrative claims, the

remainder would go to the reorganized debtor, which would then be in a better position to meet its financial commitments, if any, under the plan); *In re Acequia, Inc.*, 34 F.3d 800, 811-12 (9th Cir. 1994) (allowing recovery of fraudulent transfers even though unsecured creditors have been paid in full when recovery would aid continuing performance of post confirmation obligations and reimburse the bankruptcy estate for fraudulent conveyance litigation costs); *In re Trans World Airlines, Inc.*, 163 B.R. at 973 ("basic purpose of recovery pursuant to § 550(a) is to enlarge the estate for the benefit of creditors . . . whether any of it is distributed is a function of the conduct of the case and the negotiations of the plan of reorganization"); *In re Centennial Industries, Inc.*, 12 B.R. at 102 (recovery sufficient so long as unsecured creditors received some benefit from the recovery of the preferences, even if it was not an increase in the amount they would receive).

Section 544(b)'s avoidance remedy fosters the overall bankruptcy policy favoring reorganization. *In re Chateaugay Corp.*, 201 B.R. 48, 72 (Bankr. S.D.N.Y. 1996), *aff'd in part*, 213 B.R. 633 (S.D.N.Y. 1997) ("[p]ublic policy, as evidenced by chapter 11 of the Bankruptcy Code, strongly favors the reorganization and rehabilitation of troubled companies and concomitant preservation of jobs and going concern values"); *In re Paris Indus., Corp.*, 106 B.R. 339, 341 (Bankr. D. Me. 1989) ("The Bankruptcy Code embodies a governmental policy favoring reorganization and a fresh start"); *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 527, 528, 104 S. Ct. 1188, 79 L.Ed.2d 482 (1984) ("policy of Chapter 11 is to permit successful rehabilitation of debtors . . . fundamental purpose of reorganization is to prevent a debtor from going into liquidation").

Contrary to the FCC's position that avoidance be limited to the extent of the claims of existing creditors, it is well settled that once an obligation is deemed voidable the entire transfer is avoided to the extent necessary to benefit the estate, without regard to the size of the claims of the existing creditors whose rights and powers the debtor-in-possession is asserting. *See* 5 *Collier on Bankruptcy* ¶ 544.09[5], p. 544-21 (15th ed. 1998) (discussing *Moore v. Bay*, 284 U.S. 4, 52 S. Ct. 3, 76 L.Ed. 133 (1931)). Under Section 544(b) "if the transfer is avoidable at all by any creditor, it is avoidable in full for all creditors regardless of the dollar amount of the prevailing claim." *In re Acequia, Inc.*, 34 F.3d at 810 (quoting *Abramson v. Boedeker*, 379 F.2d 741, 748 n.16 (5th Cir.), *cert. denied*, 389 U.S. 1006, 88 S. Ct. 563, 19 L.Ed.2d 602 (1967)). *See also*, *In re Theisen*, 45 B.R. 122, 126-27 (Bankr. D. Minn. 1984) ("[O]nce avoidability is determined under state law, the transfer is entirely avoidable by a trustee in bankruptcy regardless of the amount of the creditor's claim relied upon by the trustee," discussing *Moore v. Bay* doctrine).

In this case, the appropriate remedy is avoidance of the entire obligation and reinstatement of the obligation to the extent of value given. While the literal terms of the applicable statutes (Section 544(b) of the Bankruptcy Code, which incorporates Cal. Civ. Code § 3439.04) and the case law provide for avoidance of the entire obligation, both bodies of law also offer protection to a good faith obligee. Section 548(c) of the Bankruptcy Code provides in pertinent part:

> to the extent that a[n] . . . obligation . . . is voidable under section 544 . . . a[n] obligee of such . . . obligation that takes for value and in good faith . . .

> may enforce any obligation incurred . . . to the extent that such . . . obligee gave value to the debtor in exchange for such . . . obligation.

11 U.S.C. § 548(c). California's Uniform Fraudulent Transfer Act contains a similar provision.[1] Cal. Civ. Code § 3439.08(d) states:

> Notwithstanding voidability of . . . an obligation. . . . a good faith . . . obligee is entitled, to the extent of value given the debtor for the . . . obligation, to . . . enforcement of any obligation incurred.

Thus, when an obligation is avoided under Section 544(b) of the Bankruptcy Code, both statutes entitle the obligee to enforce the obligation to the extent of value given the debtor. Recognizing yet another canon of statutory construction, namely "that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it," the proper remedy lies in Section 548(c) of the Bankruptcy Code. *See In re Granite Partners, L.P.*, 208 B.R. 332, 341 (Bankr. S.D.N.Y. 1997) (discussing restriction of remedial provisions of securities laws as interpretive analogies to Bankruptcy Code Section 510(b), citing *Touche Ross & Co. v. Redington*, 442 U.S. 560, 574, 99 S. Ct. 2479, 61 L.Ed.2d 82 (1979) and quoting *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19, 100 S. Ct. 242, 62 L.Ed.2d 146 (1979)); *see also Patterson v. Shumate*, 504 U.S. 753, 759, 112 S. Ct. 2242, 119 L.Ed.2d 519 (1992) (statute must be enforced

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[1] The legislative committee comment to Cal. Civ. Code § 3439.08(d) acknowledges that the statute was adapted from Section 548(c) of the Bankruptcy Code.

according to its terms) and *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242, 109 S. Ct. 1026, 103 L.Ed.2d 290 (1989) (plain meaning of statute governs unless demonstrably at odds with drafters' intent). Accordingly, the FCC has a valid claim that is enforceable to the extent of value given the debtor, less the sum already paid by the debtor.

The case law is consistent with the remedy expressed on the face of Section 548(c). *See, In re Telesphere Communications, Inc.*, 179 B.R. 544, 559 (Bankr. N.D. Ill. 1994) (lenders entitled to enforce their obligation to the extent of value given [the debtor]); *In re Wes Dor, Inc.*, 996 F.2d 237, 243 (10th Cir. 1993) (finding transferee liable for amount of transfer minus value extended to the debtor); *Covey v. Commercial Nat'l Bank of Peoria*, 960 F.2d 657, 662 (7th Cir. 1992) (avoiding subsidiary's guarantee of parent's debt in excess of value given to the subsidiary).

Conclusions on Remedy

While NPCI urges the Court to apply Section 544 as written, the FCC urges the Court to use "remedial flexibility." Since Section 544(b) is clear on its face and under the case law, the Court will apply the statute as written, mindful of the Supreme Court admonition that statutes should be enforced as written. *See United States v. Ron Pair Enterprises, Inc.*, 489 U.S. at 240-42, 109 S. Ct. 1026 and *Patterson v. Shumate*, 504 U.S. at 759, 112 S. Ct. 2242.

The statutory remedy is avoidance of the entire obligation upon a finding of fraudulent conveyance. *See In re Acequia, Inc.*, 34 F.3d at 809-10 ("[a] transaction that is voidable . . . may be avoided in its entirety").

However, the FCC may enforce NPCI's obligation to the extent it provided value to the debtor's estate. Stated differently, only the Fraudulently Incurred Obligation will be avoided.

The purported "remedy" urged upon the Court by the FCC in this fraudulent conveyance proceeding exhibits "remedial flexibility" to such an extent that it barely merits discussion. In the face of a statute of Congress intended to rectify inequities among creditors and facilitate reorganization of debtors, and despite this Court's finding of fact after trial that NPCI's indebtedness to the FCC was roughly five times the value of the C block licenses when conveyed, the FCC has proposed as a "remedy" that it should reclaim the licenses and, at the same time, retain all or a substantial portion of the $473 million paid by NPCI for the licenses and retain a claim in NPCI's bankruptcy for the $3.7 billion Fraudulently Incurred Obligation subordinated only to existing unsecured debt. Such a decree would reduce the value conveyed by the FCC to NPCI from $1.023 billion to zero ($0.00) while allowing the FCC to retain up to $473 million of the debtor's money and a subordinated claim for $3.7 billion. It would render NPCI hopelessly insolvent and result in prompt conversion to Chapter 7 and liquidation of this debtor.

The utter irrationality of the FCC's proposed remedy is manifest from the fact that, if the FCC reclaims the licenses, every dollar of cash and every dollar of allowed claim retained by the FCC would itself automatically become a fraudulent conveyance, since the licenses constituted the FCC's only contribution to NPCI in exchange for its cash and debt obligation. In other words, the FCC asks the Court not to rectify but to

compound the constructive fraudulent conveyance already adjudicated by ordering the debtor to return the entire value received from the FCC while allowing the FCC to retain much of what the debtor paid for that value.

The remedy proposed by NPCI and adopted by this Court is intuitively fair and equitable to both the government and the debtor's estate and implements both the letter and the spirit of the Federal and state statutes and the case law governing debtor-creditor relations. The FCC will retain an obligation for the full value of the consideration which it conveyed to the debtor. The avoidance remedy fully comports with the "benefit of the estate" standard of Section 550(a) in that the debtor's estate will be relieved of that portion of its financial obligation to the FCC for which it received no value and will be able to proceed promptly with a viable plan of reorganization, having access to the public financial markets which was precluded by reason of the $3.7 billion Fraudulently Incurred Obligation not backed by any asset value.

Although eschewed by the FCC, a more rational alternative to the avoidance remedy proposed by the debtor would be traditional rescission, which would achieve the FCC's purported primary objective of cancellation and return of the 63 C block licenses for reauction while returning the cash deposits to NPCI and cancelling all debt to the FCC. But avoidance, not rescission, is the remedy mandated by the Bankruptcy Code. Moreover, the "benefit of the estate" test and the overarching policy of the bankruptcy laws favoring reorganization both weigh heavily in favor of the avoidance remedy, since the likelihood of a successful

reorganization of NPCI appears to be high with the 63 C block licenses, and virtually nil without them.

The avoidance remedy is also far more consonant with the statutory objectives expressed in Section 309(j) of the Federal Communications Act than rescission. Under Section 309(j) the FCC was charged with achieving four clearly expressed objectives: (1) the development and rapid deployment of new wireless technology for the benefit of the public without administrative or judicial delays; (2) promotion of economic opportunity and competition by disseminating licenses among a wide variety of applicants including entrepreneurial, small businesses; (3) recovery for the public of a portion of the value of radio spectrum; and (4) the efficient and intensive use of spectrum. 47 U.S.C. § 309(j)(3). Each of these statutory policy objectives is advanced by the avoidance remedy and inhibited by rescission.

First, rescission and cancellation of NPCI's 63 C block licenses would result in lengthy and indeterminate delay in the deployment and use of those licenses. Even if there were no appeal from this Decision by either party, there can be no assurance when or whether the FCC would reauction the licenses, and it is unlikely that any reauction would be commenced in less than eight or nine months, judging from the 1999 reauction. Any reauction could be expected to take three to four months, as in the case of past auctions, and the license approval process for the successful bidder(s) could be expected to take up to five months particularly in the event of a third-party challenge, as in the case of NextWave. Thus, a delay of twelve to eighteen months or possibly substantially more would be the likely result

of rescission, which is significant in the highly competitive and rapidly moving wireless telecommunications industry.

Second, NPCI and its NextWave affiliates are not only qualified under Section 309(j) as entrepreneurial designated entities to hold C and F block licenses, but as the largest holder of PCS spectrum in the C/D/E/F blocks NextWave undoubtedly would constitute the only potential candidate to compete with the major players such as AT & T, Sprint and NextTel which the FCC's trial expert, Dr. Salant, viewed as a prime objective of the C block auction. If NPCI's 63 C block licenses were cancelled and reauctioned, there can be no assurance that NextWave or any single bidder would succeed in winning all or most of the 63 licenses, or that the FCC would award the licenses to NextWave if it were the successful bidder. Moreover, NextWave's "carrier's carrier" business strategy could provide potential access to PCS spectrum for a variety of resellers of wireless services and thereby "promot[e] . . . economic opportunity and competition by disseminating licenses among a wide variety of applicants including small businesses." 47 U.S.C. § 309(j)(3).

Third, although Section 309(j) charges the FCC only "to recover a portion of the value of the licenses for the public" (emphasis supplied), the avoidance remedy will recover for the public fisc $1.023 billion, which exceeds the full value of the 63 C block licenses ($908 million) as of February 1997. It would appear that this far exceeds the present fair market value of the 63 C block licenses, judging by the values achieved in the 1999 reauction of predominantly C block licenses.

Finally, the avoidance remedy will promote, the prompt, efficient and intensive use of PCS spectrum. Less than ten percent of the original C block licenses are currently in use. NPCI represents that it has conducted extensive site planning and/or radio frequency design in many of the markets covered by its C block licenses and has successfully installed PCS network equipment in trial systems in San Diego, San Antonio, Washington, D.C. and Las Vegas. As purportedly the only wireless provider dedicated to the wholesale "carrier's carrier" strategy, NPCI asserts that it will create competitive opportunities that do not exist in the wireless marketplace today, and may not exist in the event of rescission and reauction.

As to the FCC's subordination and "benefit to creditors" argument, *In re Best Products, Inc.*, 168 B.R. 35, 57 (Bankr. S.D.N.Y.), *aff'd*, 68 F.3d 26 (2d Cir. 1995) and *In re Crowthers McCall Pattern, Inc.*, 120 B.R. 279, 288 (Bankr. S.D.N.Y. 1990), cited in support of the FCC's contention that the $3.7 billion Fraudulently Incurred Obligation should be merely subordinated to existing unsecured creditors, rather than avoided, are conceptually inapposite. Both cases involved proceedings seeking to confirm reorganization plans and, in that context, approval of settlements of putative but unasserted fraudulent transfer claims against lenders arising out of leveraged buy-out ("LBO") transactions involving the debtor. Regarding remedy, one court recognized that "[o]ne of the murkiest areas of fraudulent transfer law as applied to LBOs is what remedy to apply when the plaintiff prevails." *Best Products*, 168 B.R. at 57. In both *Best Products* and *Crowthers McCall* the lenders in question made loans to the respective debtors and took back promissory notes in

precisely the amount of the consideration furnished by the lenders to the debtors, *i.e.*, the loans. The fraudulent transfer theory which might have been asserted against these lenders, and which was compromised in the context of the reorganization plans, was that the loans in question were merely steps in a series of transactions in connection with the LBOs by which the new shareholders, in effect, appropriated the loan proceeds to acquire the debtors' equity for their own personal benefit, thereby depriving the debtors and the debtors' other creditors of the economic benefits of the loans. The inherently "inside" nature of these LBO transactions generates a split of interest within the "estate" between the acquiring equity interest and their lender-funders versus the debtor's existing or "old" creditors. In such a context, it is not surprising that both courts would have employed language to the effect that the fraudulent transfer remedy, if any, should benefit the debtors' creditors, but that the indebtedness should be enforced vis-a-vis the debtors' equity shareholders who derived benefit to the extent of the money actually advanced by the lenders. In such a circumstance, the appropriate remedy might well be subordination, which would benefit the creditors harmed by the improper LBO diversion of the debtors' assets while leaving the lenders with a claim superior to the shareholders for the fair value of the loans which they extended to the debtors.[2]

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[2] It should be emphasized that the language relied upon by the FCC in the *Best Products* and *Crowthers McCall* decisions did not constitute holdings by the respective bankruptcy courts determining remedies in litigated fraudulent conveyance claims. The courts in both cases were merely discussing the hurdles which the debtors might face in the context of approving settlements of

The constructive fraudulent conveyance claim involved in this adversary proceeding bears no resemblance to the putative fraudulent transfer claims which were the subject of *Best Products* and *Crowthers McCall.* The debts owing to the lenders in those cases which might have been subordinated, rather than avoided altogether, in the LBO context were supported dollar-for-dollar by loans actually advanced to and received by the debtors. To avoid those debt obligations would deprive the lenders of consideration actually given and resulted in a windfall for the shareholders who allegedly were the real beneficiaries of the loan proceeds. By contrast, neither NPCI nor its shareholders or creditors received any consideration from the FCC in respect of the $3.7 billion Fraudulently Incurred Obligation, and to enforce that Obligation even as subordinated debt would constitute a windfall for the FCC. Moreover, the settlements of the putative fraudulent transfer claims against the lenders in *Best Products* and *Crowthers McCall* were approved in the context of seeking to approve those debtors' reorganization plans. By contrast, in this case to allow $3.7 billion as a subordinated claim would preclude NPCI's access to public funding and thereby undermine any practical likelihood of NPCI's success as a reorganized debtor.

Finally, Judge (now Chief Judge) Brozman's decision in *Best Products* expressly recognizes the appropriateness of the remedy fashioned in this decision in a case such as this involving avoidance of an obligation for

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possible fraudulent transfer claims which were not, in fact, litigated.

which the debtor received no consideration. Judge Brozman noted:

> On the other hand, if the underlying fraudulent transfer statute (such as DCL § 273) provides for the avoidance as fraudulent of an obligation incurred, it could be argued fairly persuasively that so much of the obligation which the debtor incurred as was not supported by consideration *to the debtor*, ought be avoidable. (emphasis in original)

Best Products at 59, citing *In re Candor Diamond Corp.*, 76 B.R. 342 (Bankr. S.D.N.Y. 1987).

Nor can the FCC take comfort from the citation and quotation on *In re Vintero Corp.*, 735 F.2d 740, 742 (2d Cir.) ("To the extent that [a debtor's] other creditors . . . are affected adversely by enforcement of [an avoidable] security interest, there is no reason why such interest should not be enforced"), *cert., denied*, 469 U.S. 1087, 105 S. Ct. 592, 83 L.Ed.2d 702 (1984). There can be no question that that the debtor and its shareholders and its creditors would be affected adversely by y any enforcement of the $3.7 billion Fraudulently Incurred Obligation in exchange for which the FCC provided no consideration to the debtor.

Finally, the FCC's arguments based upon *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 474 U.S. 494, 106 S. Ct. 755, 88 L.Ed.2d 859 (1986), *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 104 S. Ct. 1188, 79 L.Ed.2d 482 (1984), *In re D.H. Overmyer Telecasting Co.*, 35 B.R. 400 (Bankr. N.D. Ohio 1983) and *In re Nitec Paper Corp.*, 43 B.R. 492 (S.D.N.Y. 1984) to the effect that bankruptcy proceedings cannot be used to override the regulatory

authority of administrative agencies have been fully dealt with in this Court's December 7, 1998 decision on the FCC's motion to dismiss for lack of subject matter jurisdiction and June 16, 1999 decision denying the FCC's motion to lift the automatic stay. Reference is made to those decisions. Suffice it here to say that the issues before this Court in this adversary proceeding concern solely the debtor-creditor relationship between the FCC and NPCI. Nothing in the Federal Communications Act or elsewhere in the law exempts the FCC from the operation of the Bankruptcy Code *in its capacity as a creditor.* Nothing in this Court's May 12 Decision or in this Decision on Remedy implicates the FCC's regulatory jurisdiction.

NPCI is entitled to judgment in accordance with this Decision.

APPENDIX I

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Bankruptcy No. 98 B 21529(ASH)

IN RE NEXTWAVE PERSONAL COMMUNICATIONS, INC., ET AL., DEBTORS

June 16, 1999

DECISION DENYING MOTION TO LIFT THE AUTOMATIC STAY

ADLAI S. HARDIN, JR., Bankruptcy Judge.

Following this Court's decision dated May 12, 1999 (the "May 12 Decision") sustaining the constructive fraudulent conveyance claim of debtor NextWave Personal Communications, Inc. ("NPCI"), the Federal Communications Commission ("FCC") has moved to lift the automatic stay under 11 U.S.C. § 362(d)(1) for "cause." The alleged "cause" is that, by reason of the May 12 Decision, NPCI will not be paying the full amounts of its winning bids in the C block auction for 63 spectrum licenses awarded to it by the FCC.

For the reasons stated below, the motion is denied.[1]

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[1] The Court has jurisdiction of the debtor's Chapter 11 case and this contested matter by reason of 28 U.S.C. §§ 1334(a) and 157(a) and the standing order of reference dated July 10, 1984 signed by

In addition to the May 12 Decision, of particular relevance to this motion is this Court's Revised Decision on Motion to Dismiss dated December 7, 1998 (the "December 7 Decision"), which granted in part and denied in part the FCC's motion to dismiss for lack of subject matter jurisdiction NPCI's adversary proceeding against the FCC. To avoid unnecessary repetition in this decision, familiarity with the December 7 Decision and the May 12 Decision is assumed.

NPCI's winning bids for the 63 spectrum licenses in the C block auction and reauction ending May and July 1996 totaled $4.7 billion, an average of $1.53 per MHz/Pop. The C block licenses were not awarded to NPCI until January 1997. The FCC's auction of D, E and F block licenses commenced in September 1996 and concluded in mid-January 1997. The average price bid per MHz/Pop for D, E and F block licenses was $0.33. The prices bid in the D/E/F block auction and other factors[2] undermined the public perception of the value of the C block licenses and made it impossible for the winning C block licensees to raise any money in the public market necessary to build out their wireless systems as required under the FCC license regulations. *See* 47 C.F.R. § 24.203.

NPCI filed its Chapter 11 petition on June 8, 1998 and, the same day, filed its adversary proceeding against the FCC seeking, *inter alia*, to declare voidable its $4.7 billion bid obligation as a constructive fraudulent conveyance under 11 U.S.C. § 544. In the May 12 Decision this Court sustained the constructive fraudu-

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Acting Chief Judge Robert J. Ward. This is a core proceeding under 11 U.S.C. § 157(b)(2).

[2] *See* May 12 Decision at footnote 11.

lent conveyance claim based upon findings that the total value received by NPCI in exchange for its payment obligation to the FCC was $1.023 billion. As a consequence of the May 12 Decision and the Court's Decision on Remedy, the NPCI's payment obligation to the FCC will be reduced from $4.7 billion to $1.023 billion.

The FCC's motion to lift the automatic stay is based upon (i) the fact that NPCI will not be paying the full $4.7 billion that it bid for its 63 C block licenses and (ii) the FCC's own regulations.

The FCC's regulations conditioned the grant of C block licenses upon the licensee's "full and timely payment of the winning bid." 47 C.F.R. § 24.708(a); *see also* 47 C.F.R. § 1.2109(a) (1996) (same). In circumstances where the regulations permit certain designated entities such as NPCI to pay the full amount of their high bids in installments over the term of their licenses, 47 C.F.R. § 1.2110(e) (1996), a license "granted to an eligible entity that elects installment payments shall be conditioned upon the full and timely performance of the licensee's payment obligations under the installment plan." 47 C.F.R. § 1.2110(e)(4) (1996). In the event of default by the licensee, "the license will automatically cancel and the Commission will initiate debt collection procedures." 47 C.F.R. § 1.2110(e)(4)(iii) (1996).

Asserting that the requirement that a licensee pay its winning bids in full "is the keystone of the FCC's spectrum auction program" (FCC Memo at 2),[3] the FCC

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[3] This assertion may be viewed with some skepticism in view of the FCC's oft-repeated acknowledgement that revenue generation

argues in substance that the provision in the regulations for automatic cancellation of NPCI's licenses upon default in NPCI's payment obligation constitutes "cause" under Section 362(b)(1) of the Bankruptcy Code for relief from the automatic stay to permit the FCC, in effect, to reclaim the "cancelled" licenses and otherwise pursue its remedy under its regulations.

The issue thus raised is closely related to the issues raised in the FCC's initial motion to dismiss for lack of subject matter jurisdiction. For this reason. the analysis in the December 7 Decision largely disposes of the FCC's contentions on this motion. To summarize that Decision, Section 309(j) of the Federal Communications Act ("FCA") provides the statutory authority for the FCC's spectrum auction program, including the authorization to grant special financing incentives to designated entities through deferred payment in installments. In so doing, Congress authorized the FCC not only to act in its capacity as a regulator of spectrum licenses, but also to become a creditor of licensees qualifying as designated entities. However, nothing in Section 309(j) or elsewhere in the FCA granted the FCC, acting in its capacity as a creditor, any rights, privileges or obligations superior to or different from the rights, privileges and obligations of other creditors. More specifically, nothing in the FCA or elsewhere granted the FCC acting as a creditor any exemption from the provisions of the Bankruptcy Code, and Congress has declined to grant any such exemption despite the FCC's attempts to lobby for such an exemption.

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for the Federal government is *not* the primary objective of Section 309(j) of the FCA and the FCC's auction regulations.

With this perspective, the FCC's contentions on this motion may be easily resolved. Like any other creditor, the FCC is subject to the avoidance powers provided in Sections 544 and 548 of the Bankruptcy Code. As would be the case with any other creditor in similar circumstances, for the reasons set forth in the May 12 Decision NPCI's aggregate bid obligation to the FCC of $4.7 billion was subject to avoidance to the extent of $3.7 billion. As a consequence, NPCI's "payment obligations" to the FCC *have been reduced* from $4.7 billion to $1.023 billion, of which some $473 million has already been paid. The balance will have to be paid by NPCI under the installment plan authorized by Congress and implemented by the FCC regulations. Of course, if NPCI were to default in the future in its payment obligation on the balance, its spectrum licenses would then be subject to automatic cancellation under 47 C.F.R. § 1.2110(e)(4)(iii). But for the present NPCI is not in default. Unless and until NPCI defaults in "the full and timely performance of [its] licensee's payment obligations under the installment plan," there is no default and, therefore, no "cause" to lift the automatic stay under 11 U.S.C. § 362(d)(1).

The FCC argues that its regulations condition grant of the licenses upon "full and timely payment of the *winning bid amount*" (emphasis supplied), citing to the language in Section 24.708(a) of 47 C.F.R. NPCI retorts that the automatic cancellation provision in Section 1.2110(e)(4)(iii) refers to default in the "fall and timely performance of the licensee's *payment obligations*" (emphasis supplied). But the difference in wording between "winning bid amount" and "payment obligations" is immaterial. Whatever the verbiage, the substance of the matter is that the FCC's right to

payment as a creditor is subject to avoidance under the relevant Bankruptcy Code provisions just like the right to payment of any other creditor.

Nor is it material that the FCC has provided in its regulation that the grant of the licenses is conditioned upon full payment of either the licensee's "winning bid amount" or "payment obligations," or that the regulations provide for automatic cancellation of the licenses upon default. Aside from the fact that there has been no default by NPCI, the FCC's own regulations are entitled to no more nor less weight in the context of bankruptcy proceedings than the contractual notes, mortgages and similar documents required by other creditors in commercial transactions. Creditors' rights under their contracting documents are frequently subject to modification under provisions of the Bankruptcy Code such as the avoidance powers in Sections 544 and 548. Stated simply, the FCC's regulations, to the extent that they establish and govern the rights and obligations of the FCC and the licensee *in their capacities as creditor and debtor*, are subject to modification under the Bankruptcy Code, just like the contractual rights and obligations of an ordinary creditor vis a vis its debtor. As stated in the December 7 Decision:

> The basic defect in the FCC's argument is that Congress did not confer upon the FCC the power to determine unilaterally its own rights as a creditor in competition with and to the detriment of other creditors. . . . Nothing in Section 3090 or elsewhere in the FCA even suggests that Congress intended to empower the FCC to promulgate orders [or regulations] which have nothing to do with its regulatory functions and which are designed solely

> to enhance the FCC's position as a creditor to the detriment of rights provided under the Bankruptcy Code for the benefit of other creditors and the debtor.

The cases relied upon by the FCC do not support its position. For the contention that "[t]hese regulatory conditions upon the Licenses remain fully enforceable by the FCC even though NextWave is in bankruptcy" (FCC Memo at 2) the FCC cites *In re Farmers Markets, Inc.*, 792 F.2d 1400, 1403 (9th Cir. 1986), where the Ninth Circuit said "the estate takes the license subject to the restrictions imposed on the debtor by its transferor." To the same effect the FCC cites *In re Bay Ridge Inn*, 94 F.2d 555 (2d Cir. 1938). As pointed out in NPCI's opposing memorandum, both *Farmers Markets* and *Bay Ridge* concern sale or transfer of liquor licenses from one party to another, with direct implication of the governmental regulatory power. Similarly, the case of *In re Gull Air, Inc.*, 890 F.2d 1255 (1st Cir. 1989) concerns the FAA's power under regulations respecting the use of airport slots not being used by the debtor airline and having nothing to do with any debtor-creditor relationship. By contrast, the regulations relied upon by the FCC in this case are concerned solely with the debtor-creditor relationship between the parties and do not implicate the FCC's regulatory jurisdiction.

To summarize, the FCC is subject to the provisions of the Bankruptcy Code in its capacity as a creditor. NPCI's payment obligations to the FCC in respect of its winning bids on C block licenses have been modified in accordance with the avoidance provisions of Section 544 of the Bankruptcy Code. The modification of the

FCC's rights as a creditor in accordance with the Bankruptcy Code does not constitute a default by NPCI, and NPCI is not in default in respect of its modified payment obligations. Accordingly, there is no "cause" to lift the automatic stay under Section 362(d)(1), and the FCC's motion must be denied.

APPENDIX J

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
WHITE PLAINS DIVISION

Bankruptcy No. 98 B 21529(ASH)
Adversary No. 98-5178A

IN RE NEXTWAVE PERSONAL COMMUNICATIONS, INC., ET AL., DEBTORS

NEXTWAVE PERSONAL COMMUNICATIONS, INC., PLAINTIFF

v.

FEDERAL COMMUNICATIONS COMMISSION, DEFENDANT

May 12, 1999

DECISION ON CONSTRUCTIVE FRAUDULENT CONVEYANCE CLAIM

ADLAI S. HARDIN, JR., Bankruptcy Judge.

In January 1997 defendant Federal Communications Commission ("FCC") awarded to plaintiff-debtor NextWave Personal Communications, Inc. ("Debtor" or "NPCI") 63 C block licenses for radio spectrum for personal communications service ("PCS") based on NPCI's winning bids aggregating $4.7 billion in the C block auction and reauction ending in May and July

1996. Concluding subsequently that the value of its C block licenses had been less than $1 billion in February 1997 when it executed notes to the FCC for 90% of its bid obligation, NPCI commenced this adversary proceeding in June 1998 seeking, *inter alia*, a determination that its deposits and promissory notes aggregating $4.7 billion (the "Transfers") constituted constructively fraudulently conveyances subject to avoidance under 11 U.S.C. § 544.

On the facts and the law, I conclude that the Transfers are subject to avoidance under Section 544 in the measure calculated at the foot of this decision.

Jurisdiction

This Court has jurisdiction over this adversary proceeding under 28 U.S.C. §§ 1334(a) and 157(a) and the "Standing Order of Referral of Cases to Bankruptcy Judges" of the United States District Court for the Southern District of New York, dated July 10, 1984 (Ward, Acting C.J.). This is a core proceeding under 28 U.S.C. § 157(b)(2)(H).

Procedural Background

On June 8, 1998 NPCI and certain of its affiliates filed petitions under Chapter 11 of the Bankruptcy Code, and on the same date NPCI filed this adversary proceeding. On July 13, 1998 the FCC moved simultaneously to withdraw the reference and to dismiss the adversary proceeding for lack of subject matter jurisdiction. The District Court denied the motion to withdraw the reference on November 9, 1998. This Court scheduled a hearing on the motion to dismiss and on December 7, 1998 issued a decision denying the motion

with respect to the constructive fraudulent conveyance claim and granting the motion to the extent of dismissing the debtor's other claim against the FCC.

On January 26, 1999 the FCC made a motion for partial summary judgment with the object of determining whether the C block licenses should be valued as of the May and July 1996 dates of conclusion of the auction and reauction, or in January/February 1997 when the FCC awarded the C block licenses to NPCI and NPCI issued its promissory notes for $4.2 billion. On February 16, 1999 the Court issued its decision determining that the C block licenses should be valued as of January/February 1997 when the licenses were awarded and the debtor completed the Transfers.

On March 24, 1999 the FCC filed a motion for judgment on the pleadings asserting, in substance, that the controlling Federal law does not recognize constructive fraud liability in connection with financial transactions that are open to public scrutiny. On April 2, 1999 the Court denied the FCC's motion in an oral ruling and held a final pretrial conference.

The case was tried in seven lengthy trial days commencing April 19 and concluding April 27. The adversary process and the Court benefitted by exceptionally able counsel and witnesses on both sides.

Findings and Conclusions

The following are the Court's findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52 made applicable in this proceeding by Bankruptcy Rule 7052.

Facts

Allocation and Auction of Radio Spectrum

Wireless telecommunications (telephony) involve the transmission of voice and data between points using radio frequency spectrum as the transport medium. The first cellular telephone systems, developed by Bell Laboratories in the 1960s, derived their name from the small geographic areas, called "cells," into which the service region was subdivided. Each cell was supported by a single transmitter/receiver called a base station, which was connected to the public switched telephone network via a mobile services switching center using traditional lines or microwave link. Cellular systems utilized analog technology, although cellular operators are switching to digital.

In 1981 the Federal government, through the FCC, began the process of establishing commercial wireless networks in the United States by designating two cellular licensees within each metropolitan statistical area ("MSA"). These licenses were for frequency located in assigned portions or bandwidths designated in megaherz ("MHz") of the radio spectrum. By 1989 cellular service was operational in every MSA, and the same year the FCC auctioned additional licenses for each rural statistical area ("RSA"). In the early 1990s the government decided to end the cellular duopoly controlling wireless services in the MSAs and RSAs by establishing new licenses that could be used to compete with the incumbent cellular carriers. Specifically, spectrum bandwidth was set aside for PCS.

Prior to Congress' enactment of Section 309(j) of the Federal Communications Act ("FCA"), the House Committee on Energy and Commerce (the "Committee") recognized that the radio frequency spectrum is a "precious but limited resource [that] has become vitally important to our economic success and social well being." *See* H.R. Rep. No. 103-11 at 247-48 (1993), reprinted in 1993 U.S.C.C.A.N. 378, 574-75. Noting that the congested state of the radio frequency spectrum limited the ability to accommodate new spectrum-dependent technologies and that existing procedures for issuing radio spectrum licenses by lottery and comparative hearings had resulted in regulatory inefficiencies and permitted licensees to exploit a national resource unjustly, the Committee concluded

> that a carefully designed system to obtain competitive bids from competing qualified applicants can speed delivery of services, promote efficient and intensive use of the electromagnetic spectrum, prevent unjust enrichment, and produce revenues to compensate the public for the use of the public airwaves.

Id. at 580.

In Section 309(j) of the FCA Congress authorized the FCC to issue radio spectrum licenses for PCS to various categories of qualified applicants through a system of competitive bidding. 47 U.S.C. § 309(j)(1), (2). Among the categories of applicants, the FCC was directed by the statute to designate portions or "blocks" of the radio spectrum for auction to small, emerging businesses and to establish flexible, deferred license payment plans at below market interest rates to enable such enterprises to participate and compete in the communications industry. 47 U.S.C. § 309(j)(3)(B) and (4)(D).

Consistent with this Congressional mandate, the FCC divided spectrum to be used for PCS into "blocks" designated as the A/B/C/D/E/F blocks and promulgated detailed regulations for public auction of all six blocks. The regulations were adopted with the advice and counsel of knowledgeable experts in the private sector after public hearings and were well designed to ensure that all participants had access to maximum relevant information and opportunity to bid. There are four principal differences among the six blocks—geographic area covered, amount of spectrum per license, eligibility to participate in the auction and timing of the auction.

The A and B block licenses are allocated geographically to 51 Major Trading Areas ("MTAs") throughout the United States and its territories based on the Rand-McNally Commercial Atlas & Marketing Guide (the "Guide"). The C, D, E and F block licenses are allocated geographically to 493 Basic Trading Areas ("BTAs") throughout the United States and its territories based on the Guide. Thus, every MTA incorporates within its borders a cluster of BTAs. Each MTA and BTA is covered by a single license for each block. Hence, the FCC auctioned 51 licenses in each of the A block and B block auctions and 493 licenses in each of the C, D, E and F block auctions.

Each A and B block license is for thirty MHz of spectrum. The C block licenses also consist of thirty MHz of spectrum. Each D, E and F block license covers ten MHz of spectrum.

The C block and F block auctions were open only to entrepreneurs or small businesses including start-up companies, firms owned by minorities or women, and rural telephone companies, sometimes referred to as

"Designated Entities." Consistent with the mandate of Section 309(j), recognizing that such entrepreneurial and modestly capitalized enterprises would be incapable of competing with large, established and well-financed companies either in the auction process or the marketplace, Designated Entities received material financial benefits as well as the exclusive right to bid in the C and F block auctions. Respecting the C block, "small businesses" received a 25% bidding credit and the right to pay 90% of their high bid obligation to the FCC (net of the credit) over a ten-year license period, with payment of interest only for the first six years and quarterly installment payments of interest and principal in the last four years. With respect to F block, "small businesses" received a 15% bidding credit, and "very small businesses" received a 25% bidding credit, and the right to pay 80% of their high bid obligations to the FCC (net of the credit) over a ten-year period, with payment of interest only for the first two years and quarterly installment payments of interest and principal in the last eight years. The interest rate payable by C and F block licensees was the rate on 10-year U.S. Treasury Notes at the time of the license issuance.

All of the auctions were conducted in a simultaneous, multiple round, license-by-license, open bid format. The A/B block auction was conducted simultaneously between December 5, 1994 and March 13, 1995. All of the A/B block licenses, with the exception of certain licenses granted pursuant to pioneer preference grants, were conditionally granted on June 23, 1995. The FCC did not conduct any other broad band PCS spectrum auction prior to the A/B block auctions. There were thirty qualified bidders in the A/B block auction. The 102 licenses issued in these auctions (51 A block; 51 B

block) were awarded to bidders who paid an aggregate sum of $7.7 billion for all 102 licenses.

The first C block auction was conducted between December 19, 1995 and May 6, 1996. There were 255 qualified bidders competing for 493 licenses. The regulations prohibited any participant from being declared high bidder of more than 98 (*i.e.*, 20%) of the C block licenses. 47 C.F.R. Ch. I, § 24.710(a).[1] From July 3 to July 16, 1996 the FCC reauctioned certain C block licenses that had become available when the previous high bidders defaulted. Competition in the C block auction, particularly for licenses for BTAs having higher population densities (referred to as "Pops," or population expressed in 000's, as 2,400 Pops for 2,400,000 of population), was intense and drove prices to extraordinarily high levels in comparison to the prior A/B block auction and the subsequent D/E/F block auction. The aggregate net high bids totaled $10.071 billion in the initial C block auction and $904.6 million in the July 1996 reauction.

Although the FCC had issued a release in August 1995 stating that D/E/F block licenses would be auctioned in the last quarter of 1996, it appears that participants in the marketplace did not anticipate that the D/E/F blocks would be auctioned immediately after the C block auction and before the C block licenses had been awarded and necessary financing to "build out" the C block licenses obtained. Nevertheless, in August 1996 the FCC scheduled the D/E/F block auction, which took place from August 26, 1996 through January 14,

[1] The same limitation applied to the F block auction. The regulation prohibited indirect violation of the 20% limitation by the use of affiliates. *Id.* at § 24.710(b).

1997. Like the prior PCS auctions, the D/E/F block auction was conducted simultaneously in open bid, multiple round format. Fourteen hundred seventy-nine licenses were at issue in the D/E/F block auction, 493 for each block. There were 153 qualified bidders. Although the D/E/F block auction did not formally close until January 14, 1997, over 80% of the bidding was completed by October 30, 1996, and it was clear by early November that the prices paid for the D/E/F block licenses would be a fraction of those paid in the C block auction. The aggregate high bids, net of bidding credits, for the 1,493 D, E and F block licenses totaled $2.5 billion.

As a consequence of the three PCS auctions, the largest PCS licensees are Sprint PCS and AT & T Wireless PCS, with combinations of A, B, D and E block licenses covering 99% and 93% of total U.S. Pops. The third largest holder of PCS spectrum is NextWave (through its subsidiaries) with 61% of Pops covered, followed by OmniPoint PCS Entrepreneurs (36%), Western Wireless (23%) and PrimeCo PCS (23%), all holding combinations of 30 MHz and 10 MHz licenses in the C and D/E/F blocks.

In addition to the numerous categories of spectrum other than PCS utilized for wireless telephony, wireless operators employ a variety of technologies. The original analog systems have been largely replaced by digital standards, principally time division multiple access ("TDMA"), global system for mobile communications ("GSM"), frequency division multiple access ("FDMA") and code division multiple access ("CDMA"). Third generation wireless technology (3G) is the next wireless technology for future applications. AirTouch,

Sprint, PCS, Bell Atlantic and PrimeCo (PCS) have all deployed CDMA, forming a nationwide footprint among the cellular and PCS operators. NextWave utilizes CDMA technology.

Although the market for wireless communication has expanded enormously in the 1990s, so has competition and the number of wireless operators, resulting in a dramatic reduction in average revenue per user ("ARPU"). Monthly ARPU declined from $96.83 at year-end 1987 to $47.70 by the end of 1996.

The three separate auctions conducted for the A/B blocks, the C block and the D/E/F blocks produced radically different financial consequences. The six auctions involved different quanta of geography and population (MTAs for the A and B blocks; BTAs for the C, D, E and F blocks) and spectrum (30 MHz for the A, B and C blocks; 10 MHz for the D, E and F blocks). Nevertheless, prices for PCS licenses may be compared, *inter alia*, by stating the prices in terms of Price per Pop or Price per MHz-Pop. The A/B block licenses were auctioned for an average price of $0.52 per MHz-Pop (all prices here expressed net of bidding credits). For C block, the average price for the main auction ending May 6, 1996 was $1.33 per MHz-Pop, and for the July reauction the average price was $1.94 per MHz-Pop. The D/E/F block licenses were auctioned for an average price of $0.33 per MHz-Pop. NPCI bid an average of $1.53 per MHz-Pop for its 63 C block licenses.

Cellular and PCS operators are not the only ones utilizing radio spectrum for wireless telephone communications. One such system is enhanced specialized mobile radio ("ESMR"). The primary operator utilizing ESMR to construct a nationwide wireless network is

Nextel Communications ("Nextel"). The FCC auctioned ESMR licenses in the 800 MHz frequencies in 1997. The FCC also auctioned licenses for wireless communications services ("WCS") in 1997, and thereafter the FCC auctioned spectrum for local multipoint distribution service ("LMDS"), which can be used for a variety of services, including wireless telephony and data.

Before turning to the particular facts in this case, it is important to highlight a distinguishing feature of the spectrum auctions. In the traditional auction the declaration of the winning bidder fixes the winner's right to and obligation to pay for the thing auctioned. There is little gap in time between the "fall of the hammer" and the exchange of payment for title to the thing auctioned. Not so in a spectrum auction. The FCC's acceptance of a high bid for a license in a particular BTA did not entitle the winner to the license, but only to the exclusive right to file a long form application seeking FCC approval for the license. Such approval was by no means assured and was subject to challenge by competing bidders or others. The approval process might take months to complete, and did in the case of the C block auction.

During the gap period between the conclusion of the C block auction and reauction in May and July 1996 and the approval of NPCI's application in January 1997 there was a profound change in the value of spectrum as perceived by participants in the PCS market and the financial community on which the participants were dependent. This change in perception of value is the genesis of this controversy.

NextWave Participation in the C/D/E/F Block Auction

NPCI is a wholly-owned subsidiary of NextWave Telecom Inc. ("NTI"), a corporation organized and existing under the laws of the State of Delaware with its principal place of business in San Diego, California, and a place of business in Hawthorne, New York. Among NTI's direct and indirect subsidiaries which filed a Chapter 11 petition on June 8, 1998 was NextWave Power Partners Inc. ("NPPI"). NTI filed for relief under Chapter 11 on December 23, 1998. NTI and its affiliates which have filed in this Court are collectively referred to as "NextWave". NextWave was organized in May 1995 to take advantage of the opportunities in the relatively young but burgeoning wireless telephony industry provided by Section 309(j) of the FCA for small businesses qualified to participate in the C and F block auctions.

C Block Auction

At the conclusion of the C block auction on May 6, 1996 the FCC announced that it had received high bids for the 493 C block licenses and designated approximately 90 high bidders. NPCI was declared the high bidder on 56 licenses. On July 3, 1996 the FCC commenced the 1996 reauction for eighteen C block licenses that became available when previously-declared high bidders failed to tender their required earnest money deposits. At the close of the reauction on July 12, NPCI was high bidder on seven additional licenses, bringing its total C block licenses to 63.

The FCC regulations required prospective bidders to deposit funds with the FCC in advance of the auctions to establish their eligibility to bid ("upfront payments"). The regulations further required winning bidders to make an additional deposit with the FCC to bring their total earnest money deposit to 5% of their total bid obligation. NPCI complied with these requirements, and as of July 23, 1996 NPCI had deposited with the FCC upfront payments and post-auction and reauction deposits aggregating $237,182,402 (the "Pre-License Payments"), representing 5% of NPCI's total bids of $4,743,648,000. NPCI duly filed long-form applications for all 63 C block licenses for which it was declared high bidder. Objections to NPCI's applications were filed by several different entities. The objections were overcome, and on January 3, 1997 the FCC announced that NPCI would receive its 63 C block licenses, conditioned on compliance with its financial obligations to the FCC.

As required, on January 9, 1997 NPCI made an additional deposit with the FCC bringing its total cash deposits to $474,364,806, or 10% of the total bid price.

On February 14, 1997 the FCC granted NPCI's licenses conditioned upon NPCI executing a series of promissory notes dated as January 3, 1997 payable to the FCC in a total face amount of $4,269,283,223 (the "Notes"). On February 19, 1997 NPCI signed the Notes and accompanying security agreements and delivered them to the FCC.

D/E/F Block Auction

NPCI's affiliate NPPI was the high bidder on 32 10 MHz licenses in the D/E/F block auction which concluded in mid-January 1997. On April 28 and June 27,

1997 the FCC announced the conditional grants to NPPI of 25 D/E/F block licenses and seven D/E/F block licenses, respectively.

NextWave's Efforts to Obtain Public Financing

Like other Designated Entities eligible for the C and F block auctions, NextWave's fledgling capitalization and lack of operating income made resort to the public capital markets essential to fund the high capital cost to build out its PCS system so as to make use of its spectrum licenses. As stated in its Registration Statement filed with the Securities and Exchange Commission (the "SEC") on February 3, 1997 (p. F-7):

> The Company is a development stage enterprise which has incurred net losses since its inception. In order to implement its business plan, significant capital will be required to (i) meet the Company's obligations to the FCC, (ii) build out the PCS network infrastructure necessary to provide service and (iii) cover its operational expenses.

NextWave anticipated that it would require approximately $700 million in public financing to implement its business plan. Half of this amount was proposed to be raised by an initial public offering of equity securities and half by a high yield debt offering. Merrill Lynch was initially retained as lead investment banker for the equity and debt offerings. Additional underwriters for the equity offering included Lehman Brothers, Bear Stearns, Prudential Securities and ING Barings. Additional underwriters for the high yield debt offering included CIB Wood Gundy, Bear Stearns, Lehman Brothers, Prudential Securities and ING Barings. In October 1996 Smith Barney became the lead investment banker for the equity offering and CIB Wood Gundy became the lead investment banker for the debt offering, the other underwriters remaining the same.

The evidence at the trial demonstrated conclusively that, despite the best efforts of NextWave and its investment bankers, it was impossible to obtain the public financing required to build out NextWave's PCS infrastructure and implement its business plan. Although NextWave did obtain loans aggregating some $70 million from two prospective equipment suppliers pursuant to preexisting contractual arrangements, no equity or debt financing could be obtained in the public market.

NextWave was not the only C block licensee to find the public capital markets closed. Approximately $1.6 billion of public financing was sought by C block licensees after the award of their licenses. Not one dollar of this $1.6 billion was raised in the public market. To this date, nearly three years after the 1996 auction and reauction, less than 10% of the C block licenses awarded by the FCC have been placed in service.

FCC Hearings on Restructuring for C Block License Obligations[2]

The marketplace reaction to the C block debt to the FCC did not go unnoticed by the FCC. In early 1997 the FCC received several requests from C block licen-

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[2] Source: FCC Memorandum in support of its initial motion to dismiss at pp. 4-7. The Court takes judicial notice of those documents in the public record annexed to the FCC's motion to dismiss upon which the factual recitation in the FCC's Memorandum was based.

sees for relief from their installment payments that described a range of difficulties in accessing the capital markets. The FCC Wireless Telecommunications Bureau also received several proposals from C block licensees regarding alternative financing arrangements, as well as a petition for rulemaking regarding C block installment payments. In response to these requests, effective March 31, 1997 the FCC suspended the C block installment payments indefinitely and initiated an elaborate administrative process for restructuring C block license obligations.

On June 2, 1997 the FCC issued a public notice seeking comment on these restructuring proposals and inviting additional ones. The FCC received over 160 filings in response.

On June 30, 1997 the FCC conducted a public forum in Washington, D.C. to discuss issues regarding C block installment payments. Both before and after the public forum the FCC received numerous comments, reply comments and *ex parte* letters and presentations which provided the Agency with a wide range of restructuring proposals from C block licensees, financial institutions, investors, equipment vendors and other interested parties. The FCC established a task force to evaluate all these proposals and to recommend an appropriate course of action.

On October 16, 1997, after more than six months of effort, the FCC rendered its initial decision regarding financial relief for C block licensees and issued a Restructuring Order which provided distressed C block licensees with four distinct, mutually-exclusive options. In response to the Restructuring Order, the FCC received 37 petitions for reconsideration, seventeen

oppositions to these petitions, sixteen replies and 38 *ex parte* filings. Several petitioners claimed that the options set forth in the Restructuring Order did "not provide commercially viable alternatives for financially troubled licensees" and "fell short of meaningful relief."

The FCC issued its Reconsideration Order on March 24, 1998. Upon review of the administrative record, the FCC decided that "a radical departure from the [Restructuring Order was] not warranted." Accordingly, the FCC left intact the "basic framework" of the Restructuring Order, modifying it only slightly in the Reconsideration Order "to allow licensees to be more flexible in making their elections for licenses in different geographic areas, to use more of the downpayments already on deposit, and to be more flexible in the use of those downpayments."

The 1999 Reauction of C, E and F Block Licenses

In the spring of 1999 the FCC conducted a reauction of 347 licenses from the C, E and F blocks, including 206 30 MHz C block licenses, 133 15 MHz C block licenses (the 15 MHz C block licenses presumably resulted from a licensee electing the disaggregation alternative under the FCC's Restructuring Orders), 6 10 MHz E block licenses and two 10 MHz F block licenses. The auction began on March 23 and concluded after 78 rounds of bidding on April 15, 1999. There were 76 qualified bidders.

Three hundred two licenses were bid in by 57 bidders, leaving 45 licenses unsold. The aggregate of net bids for all 302 licenses was $342,840,945, equating to a little less than $0.20 per MHz-Pop.

Discussion

I. *Constructive Fraudulent Conveyance Law*

A. *Statutory Framework*

Section 544(b)(1) of the Bankruptcy Code provides:

> . . . the trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title.

11 U.S.C. § 544(b).

Section 544 incorporates the Uniform Fraudulent Transfer Act ("UFTA"), as codified by the State of California, which provides, in pertinent part:

> A transfer made or an obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation as follows:
>
> * * *
>
> (b) without receiving reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
>
> (1) was engaged or was about to engage in a business or transaction for which the remaining

> assets of the debtor were unreasonably small in relation to the business or transaction; or
>
> (2) intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

Cal.Civ.Code § 3439.04 (West 1997). The UFTA, which has been adopted by 33 states and is the successor to the Uniform Fraudulent Conveyance Act ("UFCA"), resembles the provisions of 11 U.S.C. § 548 more closely than did the UFCA. 5 *Collier on Bankruptcy* ¶ 548.01[3], p. 548-8 (15th ed. 1979).

Section 548 of the Bankruptcy Code provides:

> (a)(1) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily—
>
> (A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or
>
> (B)(i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and
>
> (ii) (I) was insolvent on the date that such transfer was made or such obligation was

incurred, or became insolvent as a result of such transfer or obligation;

(II) was engaged in business or a transaction, or was about to engage in business or a transaction for which any property remaining with the debtor was an unreasonably small capital; or

(III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay such debts as such debts matured.

11 U.S.C. § 548(a).

In considering the appropriate choice of law, the fraudulent transfer provisions of California, New York[3] or the District of Columbia[4] may be applicable. The Court accepts NPCI's unopposed position that the fraudulent conveyance statutes in each of these states

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[3] New York's Debtor and Creditor Law § 273 provides:

Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration.

[4] District of Columbia Code (1981) § 28-3105 provides:

(a) A transfer made, or obligation incurred, by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

are, in all material respects, the same with a minor exception in the case of New York. To explain, both California and the District of Columbia have incorporated the UFTA. New York continues to apply the UFCA, which requires the exchange of "fair consideration" rather than "reasonably equivalent value." N.Y. Debt. & Cred. Law § 273 (McKinney 1990). Fair consideration is defined in § 272 of the New York Debtor and Creditor Law to incorporate the concept of "good faith." *See In re Checkmate Stereo & Electronics, Ltd.*, 9 B.R. 585, 591 (Bankr. E.D.N.Y. 1981). Courts within this district have repeatedly held that the elements needed to prevail on a fraudulent conveyance action are essentially the same under New York's Fraudulent Conveyance Act and 11 U.S.C. § 548. *See, e.g., In re Ames Dept. Stores, Inc.*, 161 B.R. 87, 89 n.1 (Bankr. S.D.N.Y. 1993); *In re Curtina Int'l, Inc.*, 23 B.R. 969, 973-74 (Bankr. S.D.N.Y. 1982). The California, New York and District of Columbia fraudulent conveyance statutes are also in all material respects the same as the fraudulent conveyance provisions provided in 11 U.S.C. § 548. Because Section 548 of the Bankruptcy Code and the UFTA "are of common ancestry," both courts and commentators have concluded that "[c]ases under one are . . . authoritative under the other." *Interpool Ltd. v. Patterson*, 890 F. Supp. 259, 268 n.8 (S.D.N.Y. 1995); *see also, In re United Energy Corp.*, 944 F.2d 589, 593-94 (9th Cir. 1991); 5 Lawrence P. King, *Collier on Bankruptcy*, ¶ 548.01[4] (1999) ("Cases decided under the UFCA and UFTA are considered to be persuasive authority for similar issues arising under section 548 of the Code"). Accordingly, as the parties appear to concede, a choice of law analysis is unnecessary in the instant case since the fundamental legal principles would not change under any possible choice of law.

B. *General Purpose*

Section 544 promotes the central bankruptcy policy of equitable distribution amongst all creditors. *See In re Giordano*, 188 B.R. 84, 88 (D. R.I. 1995); *In re 375 Park Avenue Assocs., Inc.*, 182 B.R. 690, 695 (Bankr. S.D.N.Y. 1995); *In re AP Industries*, 117 B.R. 789, 800 (Bankr. S.D.N.Y. 1990) (citing *Cumberland Oil Corp. v. Thropp*, 791 F.2d 1037, 1042 (2d Cir. 1986), *cert. denied*, 479 U.S. 950, 107 S. Ct. 436, 93 L.Ed.2d 385 (1986)). Further, Section 544 advances the goal that a debtor's prepetition transfers should not deprive creditors of property from which their claims can be satisfied. *In re Stoecker*, 131 B.R. 979, 984 (Bankr. N.D. Ill. 1991) (citing H. Rep. No. 595, 95th Cong., 1st Sess. 375 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 89-90 (1978), *reprinted* in 1978 U.S.C.C.A.N. 5787).

C. *Elements of Recovery*

As set forth above, in order to prevail on its Section 544 claim, NPCI must demonstrate that it: (1) incurred an obligation (2) at a time when it was engaged or was about to engage in a business or transaction for which the remaining assets of NPCI were unreasonably small in relation to the business or transaction, or intended to incur, or believed or reasonably should have believed that it would incur, debts beyond its ability to pay as they became due (3) for which it did not receive reasonably equivalent value.

(1) *Incurrence of Obligation*

Generally an obligation is incurred when a debtor becomes legally obligated to pay. *In re Emerald Oil Co.*, 695 F.2d 833, 837 (5th Cir.1983); *Barash v. Public*

Finance Corp., 658 F.2d 504, 511 (7th Cir. 1981); *see also In re G. Survivor Corp.*, 217 B.R. 433, 440 (Bankr. S.D.N.Y. 1998). While the Bankruptcy Code is silent on the question of when a debt or obligation is "incurred," courts have not questioned that an "obligation" to pay principal indebtedness under a promissory note is "incurred" on the date the note is executed and delivered. *E.g., In re Iowa Premium Service.*, 695 F.2d 1109, 1111-12 (8th Cir. 1982); *In re Smith-Douglass, Inc.*, 842 F.2d 729, 730 (4th Cir. 1988); *In re Pippin*, 46 B.R. 281, 283-84 (Bankr. W.D. La. 1984) (holding that, for preference purposes, debtor becomes legally obligated to pay under installment payment contract when contract is executed). The California UFTA provides that "[a]n obligation is incurred . . . if evidenced by a writing, when the writing executed by the obligor is delivered to, or for the benefit of, the obligee." Cal. Civ. Code § 3439.06(e)(2). A statutory provision that is clear and unequivocal on its face should be given full force and effect. *See United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240-41, 242, 109 S. Ct. 1026, 103 L.Ed.2d 290 (1989).

Subject to section II.A., below, the issue has been addressed in the FCC's motion for partial summary judgment. In resolving that motion this Court held that the transfer of licenses for dollars and Notes occurred in the time frame January 3 to February 19, 1997. There is no dispute that the Notes were signed and delivered February 19, 1997, although dated as of January 3, 1997.

(2) *Insolvency*

Insolvency is a question of fact. *In re Roblin Indus., Inc.*, 78 F.3d 30, 35 (2d Cir. 1996). Under Section

3439.04 of the California Civil Code, NPCI needs only to prove that its remaining assets were unreasonably small in relation to the $4.7 billion transaction in which it was about to engage or that upon incurrence of the obligation, the debtor's debts were beyond its reasonable ability to repay. *See, e.g., Patterson v. Missler*, 238 Cal. App. 2d 759, 48 Cal. Rptr. 215, 217 (1965). A transfer may be avoided where the debtor does not receive reasonably equivalent value in exchange for a transfer and the debtor was either "insolvent at the time of the transfer or was engaged in business with unreasonably small capital." *See United Energy*, 944 F.2d at 594. As the term "unreasonably" is relative, it requires judicial consideration of the overall state of affairs surrounding the corporation and the transfer in question. *In re Suburban Motor Freight*, 124 B.R. 984, 999 (Bankr. S.D. Ohio); *Barrett v. Continental Illinois Nat. Bank & Trust*, 882 F.2d 1, 4 (1st Cir. 1989), *cert. denied*, 494 U.S. 1028, 110 S. Ct. 1476, 108 L.Ed.2d 613 (1990). To determine the existence of "unreasonably small assets," courts on a case-by-case basis have used a "balance sheet approach" weighing the raw financial data of the balance sheet of the debtor against the nature of the entity and its need for capital over time. *Barrett*, 882 F.2d at 4. Another approach to the "unreasonably small assets" test is a focus on the debtor's future ability to generate cash and pay its debts as they come due. *See Moody v. Security Pacific Business Credit, Inc.*, 971 F.2d 1056, 1073 (3d Cir. 1992); *see also In re Vadnais Lumber Supply, Inc.*, 100 B.R. 127, 137 (Bankr. D. Mass. 1989).

This element of a Section 544 cause of action has been resolved by the parties by stipulation. In Section V of the Joint Pretrial Order, it has been stipulated that

NPCI has and had creditors holding unsecured claims allowable under Section 502 of the Bankruptcy Code which claims arose both before and after NPCI's obligation to the FCC was incurred; that when NPCI's obligation to the FCC was incurred, NPCI was engaged or was about to engage in a business or transaction for which its remaining assets were unreasonably small in relation to the business or transaction; and that both NPCI and NextWave (as defined above) were insolvent on January 3 and February 14 and 19, 1997, and that NPCI was insolvent on June 8, 1998.

(3) *Exchange of Reasonably Equivalent Value*

The parties agree that the primary analysis of the fraudulent conveyance claim focuses upon the value of the consideration exchanged between the parties at the time of the conveyance or incurrence of debt which is challenged. *See In re Best Products Co.*, 168 B.R. 35, 54 (Bankr. S.D.N.Y. 1994); *see also In re Fairchild Aircraft Corp.*, 6 F.3d 1119, 1126 & n.8 (5th Cir. 1993); *In re Morris Communications NC, Inc.*, 914 F.2d 458, 466 (4th Cir. 1990). Essentially, the Court must determine whether NPCI received reasonably equivalent value by exchanging $474 million in cash and $4.27 billion in promissory notes for 63 C block licenses. *See Rubin v. Manufacturers Hanover Trust Co.*, 661 F.2d 979, 993 (2d Cir. 1981); *In re Curtina Int'l, Inc.*, 23 B.R. at 974; *Whitehouse v. Six Corporation*, 40 Cal. App. 4th 527, 48 Cal. Rptr. 2d 600, 604 (1995). In other words, the analysis should be directed at what NPCI surrendered and what NPCI received. *In re United Energy Corp.*, 944 F.2d at 594-95.

Reasonable equivalency is a "measurement test," wherein "all aspects of the transaction must be exam-

ined to calculate the value of all the benefits and burdens to the debtor, direct or indirect." *In re Suburban Motor Freight*, 124 B.R. at 997; *Rubin v. Manufacturers Hanover Trust Co.*, 661 F.2d 979 (2d Cir. 1981); *In re Vadnais Lumber Supply, Inc.*, 100 B.R. at 136. "There is no precise formula to ascertain what constitutes reasonably equivalent value; the court as the trier of facts must determine this issue under all of the facts and circumstances of the case." *In re Curtina Int'l, Inc.*, 23 B.R. at 974; *see also Interpool Ltd. v. Patterson*, 890 F. Supp. at 268 ("the Court must consider the facts and circumstances of each case in order to determine whether reasonably equivalent value was given"); *In re Joing v. O & P Partnership*, 82 B.R. 495, 499 (D. Minn. 1988); *In re Henry-Luqueer Props., Inc.*, 145 B.R. 771, 775 (Bankr. E.D.N.Y. 1992).

It has been said that "the debtor need not collect a dollar-for-dollar equivalent to receive reasonably equivalent value." *In re Fairchild Aircraft Corp.*, 6 F.3d at 1125-26. Instead, "[t]he touchstone is whether the transaction conferred realizable commercial value on the debtor reasonably equivalent to the realizable commercial value of the assets transferred." *Mellon Bank, N.A. v. Metro Communications, Inc.*, 945 F.2d 635, 647 (3d Cir. 1991), *cert. denied*, 503 U.S. 937, 112 S. Ct. 1476, 117 L.Ed.2d 620 (1992).

The three basic approaches to valuation are: (1) replacement cost approach, (2) the market comparison approach and (3) the income stream analysis. *See In re Executive House Associates*, 99 B.R. 266, 278 (Bankr. E.D. Pa. 1989).

Valuation was the issue tried in this case. The Court's analysis, findings and conclusion are set forth in section III, below.

II. *Preliminary Issues*

A. *Transfer Date of Pre-License Payments*

The FCC argues as a matter of law that the Pre-License Payments totaling $237,182,402[5] equating to 5% of NPCI's C block bids, which had been fully paid to the FCC by July 23, 1996, must be deemed a completed and irrevocable transfer as of that date for fraudulent conveyance purposes. The FCC asserts that "NextWave cannot seriously dispute that it received something of reasonably equivalent value in exchange for" the Pre-License Payments, which constituted a "5% opportunity cost for obtaining the 63 C block licenses for which NextWave had bid $4.74 billion."[6]

In this Court's view, the issue thus raised turns on whether the Pre-License Payments were final and irrevocable by July 23, 1996. If the Pre-License

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[5] It will be recalled that the $237,182,402 was comprised of two pre-auction upfront payments totaling approximately $86 million and two post-auction cash payments totaling approximately $151,000.

[6] In its decision on the FCC's motion for partial summary judgment, this Court held that the "transfers" as there defined (*i.e.*, the 5% deposit paid in by July 23, 1996, the additional 5% deposit paid in January 1997 and the Notes) constituted transfers made or obligations incurred in the January/February 1997 time frame and were to be valued as of those dates. The FCC did not argue in the motion for partial summary judgment that the Pre-License Payments alone should be deemed completed transfers as of July 1996, and the Court did not decide the issue now presented.

Payments were not subject to repayment to NPCI irrespective of the grant or denial of the licenses in early 1997, one would have to conclude that this 5% deposit was indeed a completed transfer for fraudulent conveyance purposes. As such, it would be in the nature of an "opportunity cost" or a "ticket of admission" to the FCC approval process and its value should be judged as of the date of payment.

On the other hand, if NPCI were entitled to recover the Pre-License Payments in whole or in part depending on the award or denial of the licenses, then to that extent the transfer could not be said to take place for fraudulent conveyance purposes until the award or denial of the licenses. The answer is to be found in the FCC regulations.

Before the auction process begins, FCC regulations require upfront payments as a condition to eligibility for bidding. 47 C.F.R. §§ 1.2106(a) and (c), 24.706(a) (All auction participants are "required to submit upfront payments in accordance with § 1.2106 . . ."), 24.711(a)(1). Any upfront payments must be credited toward any downpayments "required for licenses on which the bidder is the high bidder." 47 C.F.R. § 1.2106(d). If the upfront deposit exceeds "the required deposit of a winning bidder," the balance may be refunded "after determining that no bid withdrawal penalties are owed by that bidder." *Id.*

A clear distinction is made between bidders and the high bidder. Section 1.2106 requires the FCC to credit the upfront payment to the winning bidder's required deposit, subsuming it into the required deposit. The regulation is silent as to upfront payments of unsuccessful bidders, but it is uncontested that the amounts are

refunded to them. Since the upfront payments must be refunded to unsuccessful bidders, they cannot be considered an irrevocable "admission ticket." This is not the case, however, for the post-auction downpayment.

Once the auction closes, the FCC must declare a high bidder. 47 C.F.R. § 1.2107(a). Upon being declared the high bidder for a particular license, the bidder must promptly deposit enough money to bring its total deposit up to the 5% level and submit its "long form" application. 47 C.F.R. §§ 1.2107(b), 24.711(a)(2). The deposit is held:

> . . . until the high bidder has been awarded the license and has paid the remaining balance due on the license or authorization, in which case it will not be returned, or until the winning bidder is found unqualified to be a licensee or has defaulted, in which case *it will be returned*, less applicable payments.

47 C.F.R. § 1.2107(b), emphasis supplied. This provision makes clear that the 5% deposit, *i.e.* the Pre-License Payments, will be returned "less applicable payments," referring to the penalty provisions in Sections 1.2104(g)(2) and 24.704(a)(2).

These provisions impose penalties in the event of "default or disqualification after close of auction." The minimum possible penalty is 3% of the defaulting bidder's high bid. 47 C.F.R. §§ 1.2104(g)(2) and 24.704(a)(2).[7] One might argue that some ambiguity

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[7] The penalties under these sections might far exceed 3% of the defaulting bidder's bid, but in no event would the penalty be less than 3%.

exists regarding the applicability of these penalties because the provisions refer only to withdrawal, default or disqualification, while other sections of the regulations refer to "License grant, denial, default and disqualification," 47 C.F.R. §§ 1.2109 and 24.708, suggesting that no penalties might be mandated in the event of a "denial" of license as opposed to "disqualification." However, Section 1.2109 resolves the ambiguity in subsection (c), which states:

> A winning bidder who is found unqualified to be a licensee, fails to remit the balance of its winning bid in a timely manner, or defaults *or is disqualified for any reason* after having made the required downpayment, *will be deemed to have defaulted* and will be liable for the payment set forth in § 1.2104(g)(2).

Id., emphasis supplied. Thus the FCC's denial of a high bidder's license application, *for any reason*, will trigger at least the 3% penalty.

Taking these regulatory provisions as a whole, once a bidder has been declared high bidder, it must place at least the 3% of its bid at risk irrevocably. Win or lose in the approval process, the regulations provide for no set of circumstances in which this 3% minimum may be returned to the high bidder.

The FCC is therefore correct to the extent that 3% of a bidder's total bid, or three-fifths of its downpayment, was in substance and effect an "admission ticket" to the regulatory process. No guarantee that the bidder would ultimately qualify and receive a grant of license existed, but the regulations comprehend to a certainty that a high bidder will never recover at least the 3%

portion of its 5% downpayment whether by dint of default or disqualification.

Accordingly, $142,309,000 (the "3% Payment"), equating to 3% of NPCI's total C block bids of $4.74 billion or three-fifths of the Pre-License Payments, was irrevocably paid by NPCI to the FCC by July 23, 1996 and would not be repaid to NPCI irrespective of the outcome of the approval process. The consideration received by NPCI in exchange for the irrevocable 3% Payment was the exclusive right to proceed with the approval process by filing a long form application for the 63 C block licenses on which it was high bidder. That consideration constituted reasonably equivalent value for the 3% Payment as a matter of fact and law.

B. *Satisfaction of Antecedent Debt as Reasonably Equivalent Value*

Little need be said of the FCC's argument that the debtor's $474 million of cash downpayments and $4.27 billion of Notes satisfied an "antecedent debt." The argument seems to be, in essence, that when the debtor made its required license payments by delivering the Notes, and thereby did *not* default, it "satisfied" the potential penalty obligation it might have incurred if it had defaulted. Thus, the FCC asks the Court to find that NPCI's $4.7 billion of cash transfers and Notes payable to the FCC was "reasonably equivalent" in value to the penalties for which NPCI might have been liable to the FCC if NPCI had defaulted.

The argument fails because it is based on something that did not happen. The fact is that there was no antecedent debt. No penalty was ever calculated. No penalty was ever applicable. NPCI did not default and

its application was not denied. Analysis of legal rights and obligations under the Bankruptcy Code will be determined upon facts, not hypothetical default obligations never quantified or incurred.

Of course, satisfaction of a genuine antecedent debt may indeed constitute "value" for a prepetition payment or other transfer. *See*, 11 U.S.C. § 548(d)(2)(A); *In re United Energy Corp.*, 944 F.2d 589 (9th Cir. 1991). In this case, however, the "value" received by NPCI for its $4.7 billion was 63 C block licenses, not satisfaction of a fictitious antecedent debt.

III. *Valuation of the C Block Licenses*

A. *Statement of the Issue*

The parties agree on the issue that determines the outcome of the debtor's constructive fraudulent conveyance claim. As stated by NPCI:

> [T]he trial of this Adversary Proceeding requires one straight-forward determination by this Court —what was the value of NPCI's C Block licenses in February 1997? (NPCI Trial Memorandum at 2)

As stated by the FCC:

> The only issue for this Court to resolve at trial is whether the cash transfers made, and payment obligations incurred, by plaintiff-debtor . . . during the C block auction and licensing process were reasonably equivalent in value to the radio spectrum rights that NextWave acquired from [the FCC]. (FCC Trial Memorandum at 1)

The parties agree that:

> Furthermore, the proper analysis focuses solely on the value of the consideration exchanged between the parties "at the time of the conveyance or incurrence of debt which is challenged." [citations omitted] (FCC Trial Memorandum at 4; NPCI's Response at 2)

Nevertheless, highly competent experts for the parties presented radically disparate conclusions on the issue. Their divergence reflects the different methodology and different concept of "value" employed by each side. The task of the Court is to determine which approach most faithfully accords with the statute and case law.

B. *Methodology*

As noted above, there are three generally-accepted methods of valuing property—(1) the replacement cost approach, (2) the market comparison approach, and (3) income stream or discounted cash flow analysis. Replacement cost measures the value of an asset by the cost to construct or replace it with another of like utility, taking into account depreciation in the asset to be valued. The market approach measures the value of an asset through analysis of recent market transactions involving comparable property. The income approach measures the value of an asset by the present value of its future earnings using discounted cash flow ("DCF") analysis. For purposes of this case, the replacement cost approach is subsumed into the market approach because the cost to replace spectrum licenses can only be determined by the cost of similar licenses auctioned by the FCC. As stated by the Bankruptcy Court in a

similar litigation between a C block licensee and the FCC, *GWI PSCI Inc., et al. v. Federal Communications Commission* (*In re GWI PSCI Inc., et al.*), Adversary No. 397-3492: "The market or comparable approach and the cost approach for these assets is basically the same. Comparables are based on auctions by the FCC. The only way to replace these licenses is by purchase at an FCC auction." (Transcript of April 24, 1998 at 13)

(1) *Market Comparable Technique*

The necessary predicates for employing the market comparable method of valuation are the existence of arm's length, marketplace transactions within a reasonably proximate time frame involving the same or basically comparable assets. The assets involved in the transactions to be compared need not be identical to the property to be valued. The test is whether the properties to be compared are sufficiently similar in nature and interchangeable in function that any differences can rationally be reflected by appropriate adjustments.[8]

NPCI's expert, Anthony P. Kern, employed the market comparable approach to value the C block licenses. Mr. Kern issued two reports, one valuing the assets as of January 13, 1997, the date the FCC announced the award of C block licenses to NPCI, the other valuing as of February 19, the date on which NPCI complied with

[8] For example, virtually every parcel of real estate differs from other parcels in some respects and, indeed, real property is frequently characterized as "unique" on a piece-by-piece basis. Yet the market comparable technique is traditionally accepted as the proper method of valuing real estate in most cases, using adjustments to reconcile differences between specific parcels.

its purchase price obligations by executing the Notes and delivering them to the FCC. Mr. Kern also issued a supplementary report (collectively with the January 13 and February 19 reports, the "Kern Report") correcting a calculation omission. It is NPCI's legal position that February 19 is the proper valuation date, although Mr. Kern's valuation for February 19 is higher than that for January 13.

Mr. Kern examined for potential comparability the A and B block licenses auctioned in early 1995, the D/E/F block licenses auctioned during the last quarter of 1996 and a number of PCS license transactions subsequent to these auctions. For reasons articulated in his report, Mr. Kern rejected the A/B block auctions and the subsequent PCS license transactions as comparables.

Mr. Kern selected the D, E and F block auction prices as appropriate comparables for his analysis. After applying adjustments which he deemed appropriate to account for material differences between the C block licenses, on the one hand, and the D, E and F block licenses on the other, Mr. Kern arrived at a reconciled fair market value per Pop for the C block licenses of $7.82, equating to a fair market value for NPCI's C block licenses of $810,358,264, rounded to $810.4 million.

(2) *Discounted Cash Flow Analysis*

Discounted cash flow analysis is a long-recognized and widely-used method of predicting or projecting value. If neither replacement cost nor comparative market can be utilized, DCF analysis may be the only practical way to evaluate property.

As employed by investment bankers and economists, DCF analysis entails the creation of a computer model incorporating on a line-by-line basis assumptions and projections of the myriad components of the overall market, market penetration and sales, revenues, costs, and the asset base and capitalization which support them, projected out over all relevant market conditions expected to prevail in a finite time period, in this case ten years. DCF analysis is widely if not universally used in the business and financial world as a tool to assist management in making decisions whether to invest in or dispose of businesses or major assets. It is generally not used as a tool for determining fair market value, particularly when that determination can be made using either replacement cost or market comparables. DCF analysis is obviously more reliable if the assumptions and line item components are based on actual, historical performance figures or contractual rights and obligations.

The FCC's expert, Dr. David J. Salant, prepared and relied upon a DCF model as the basis for his conclusion of value in his report (the "Salant Report"). Dr. Salant's valuation of NPCI C block licenses using a DCF model is presented in Part IV at pages 42-47 of the Salant Report, and the "Details on the Discounted Cash Flow Valuation of Next Wave's C Block Licenses" is to be found in Exhibit F to the Report. The entire remainder of the Salant Report and Exhibits is devoted to rebuttal addressed to the Kern Report. As stated by Dr. Salant:

> A good DCF model requires the analyst to think through, document and quantify each and every revenue, cost, multiple and discount rate. While the DCF approach may require the analyst to make "hundreds of assumptions," the discipline of the DCF approach in the hands of a knowledgeable practitioner means that those assumptions are logically consistent and reasonable. Indeed, one of the major advantages of the DCF approach is that another analyst can explicitly test the sensitivities of his or her result to changes in the assumptions. (Salant Report 43)

Dr. Salant continued:

> Any DCF analysis is subject to second-guessing because of the assumptions needed to complete the calculations. This DCF analysis has two main purposes: (1) to derive license values from a consistent and conservative set of assumptions based on our considerable experience in valuing PCS and cellular licenses, and (2) to compute a confidence interval, consisting of an extremely cautious lower bound and a moderately optimistic upper bound about how much a reasonable bidder/license buyer might be willing to pay for the licenses that NextWave won. The end result of our DCF analysis is a tool that allows us to perform a carefully considered estimate of the value of the licenses.
>
> We use the DCF to compute the maximum amount a very prudent firm would be willing to pay for the licenses. . . .
>
> No DCF analysis is perfect, and one can always debate the underlying assumptions. . . . Besides our own experience, our analysis uses industry sources and NextWave documents to form projec-

> tions of key variables such as penetration and average revenue per user. (Salant Report 44-45)

Under the heading "Summary Description of the DCF Model," Dr. Salant stated:

> The DCF model calculates revenues based upon information about wireless market penetration, PCS market penetration, minutes of use, retail revenue per user and wholesale revenue per user. Capital expenditures include cell site build-out and switching costs. Operating expenses include network related, marketing and billing expenses. For the base case we apply a 16% cost of capital, which is consistent with that used by NextWave in many of their DCF runs. (Salant Report 45)

In preparing his DCF analysis, Dr. Salant did not undertake to prepare and document the "hundreds of assumptions" customarily required for a DCF analysis in the business and financial world. Exhibit F to the Salant Report, entitled "Details on the Discounted Cash Flow Valuation" consists of a bar chart backed up by three sheets. The first sheet entitled "Free Cash Flow" contains the following line items: EBITDA, Taxes, FCC License Payment, Capital Expenditures, Change in Working Capital, and a resulting bottom line entitled Unlevered Free Cash Flow. The second sheet entitled "Equipment Costs" contains two categories, Non Recurring Costs (BTS Cost, Carrier Cost, Switch Cost and Switch Capacity Per Subscriber) and monthly Recurring Costs (BTS Site Cost, Carrier Cost, Switching Cost). The third sheet entitled "Key Baseline Values" contains eleven line items (Total Population, Covered Pops, PCS Company Subscribers, Basic Minutes Per User, PCS Average Revenue Per User, Data Service

Percentage of PCS Service Revenue, Capital Expenditures per Pop, Operating Expense per Pop, # BTS, # Carriers and # BSCs), and sets forth three additional assumptions, Number of Competitors at 6, Cost of Capital at 16% and Terminal Value Multiplier at 9. All line item projections on all three sheets are extended ten years from 1997 through 2006.

Once the DCF model has been created, its production of a number for value is a mathematical computation by the computer. The computation obviously will change to reflect any change in the assumptions in the model.

Dr. Salant's DCF model produced a "retail base case" value of approximately $2.5 billion as reflected on the bar chart in Exhibit F to his Report. Dr. Salant reasoned, however, that NextWave's strategy was to become a "carrier's carrier" and to market its PCS services to other providers, such as OmniPoint (with which NextWave had a marketing contract), which would in turn sell to the retail market. To reflect the value of this strategy inherent in NextWave's C block licenses Dr. Salant calculated the "wholesale base case" in the second column of the bar chart by simply eliminating from the model all costs associated with the retail part of the business. The DCF model then calculated a wholesale base case value at $31.46 per Pop, equating to approximately $3.3 billion as the value of the 110 Pops covered by NPCI's 63 C block licenses. The remaining four bars on the chart escalating to just over $8 billion showed calculations produced by the model using four modified assumptions (*viz.*, reduced build-out costs, five wireless competitors instead of six, increased data revenues, lower cost of capital).

(3) *The Meaning of Value*

The parties' experts differed profoundly not only on their conclusions as to value but on the very meaning of the "value" which each sought to quantify.

Mr. Kern sought to determine "fair market value," which he defined as "the amount at which the subject assets would change hands between a willing buyer and willing seller, in an arm's length transaction, in which both buyer and seller have reasonable knowledge of the relevant facts, and neither is under compulsion to complete the transaction." (Kern Report 1, 42) Central to Mr. Kern's conclusion is the premise that the spectrum auctions conducted by the FCC met the criteria embodied in the quoted definition of fair market value and that the prices bid at those auctions constituted the fair market values of the licenses sold as of the respective dates of the auctions. Thus, it was Mr. Kern's view that the D/E/F block auction which concluded in mid-January 1997 established the fair market value of those licenses at that time.[9] On the further premise that the C block licenses were functionally the same assets as the D/E/F block licenses, assuming various adjustments to account for differences between the various licenses, Mr. Kern concluded that the value per Pop of the C block licenses was equal to the price per Pop of the D/E/F block licenses after adjusting that price to reflect the differences between those licenses and the C block licenses.

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[9] Consistent with this premise, the debtor concedes that the fair market values of the C block licenses were equivalent to the bids accepted by the FCC at the close of the auction and the reauction in May and July 1996, as of those dates.

By contrast, Dr. Salant does not recognize the concept of fair market value as defined by Mr. Kern, and he testified that "fair market value" is not a term used by economists such as he. Price, whether established in a public auction or in a private, arm's length negotiation, is not the same as value, as Dr. Salant conceives of value. "[I]t is well-established that auction prices, especially in complex procedures, can and do depart from any notion of 'value.'" (Salant Report 5) Dr. Salant describes what he perceives as "the fundamental difference between *value* and *price*" (*id.* at 7, emphasis in original). Dr. Salant states: "We use the DCF to compute the maximum amount a very prudent firm *would be willing to pay* for the licenses" (*id.* at 44, emphasis supplied), and in his testimony Dr. Salant repeatedly described "value" as a measure of "willingness to pay." Explaining the difference between value and price in the context of an auction, Dr. Salant observed that frequently the winning bidder will pay far less than the bidder's true valuation of the asset depending upon the level of competition presented by competing bidders. Indeed, it would appear that a buyer would never intelligently pay the full "value" which he ascribed to property in his DCF model, since one would never pay now the full value which the model would predict could only be earned over a span of years if all of the assumptions built into the model proved to be correct. Thus, the "value" produced by a DCF model is what a prudent buyer ought to be willing to pay for an asset based upon the assumptions embodied in the model, without regard to actual prices in the marketplace for similar property.

C. *Conclusions on Methodology*

The FCC's expert witnesses challenged the market comparable analysis relied upon by the debtor on two basic grounds, one focusing on the perceived non-comparability of the *auctions* and the other on alleged non-comparability of the *licenses.*

First, the FCC argued that the C block auction represented a different business opportunity than the D/E/F block auction and, consequently, that the C block auction attracted far more competition and hence generated higher prices. The theory of the FCC experts was that the C block auction was the last opportunity for an operator to establish a "national footprint" with 30 MHz of spectrum to compete with the major players such as AT & T, Sprint and Nextel, and that the D/E/F block auction was intended merely as a means for "incumbents" to "fill in the gaps" in their 30 MHz systems.

One might debate this theory[10] if it were relevant, but it is not. There is no dispute that the C block

[10] Although the C block auction obviously did present a "different business opportunity" from the D/E/F block auction, it is questionable whether either the experts who devised the PCS auction process or the participants viewed the C block auction as an opportunity for the development of a truly national footprint to compete with the nationwide coverage of the major wireless operators such as AT & T, Sprint and Nextel. The C block auction was open only to entrepreneurial, small businesses and rural telephone companies with very limited capital resources. Moreover, the FCC regulations precluded any C block bidder from acquiring more than 98 licenses, 20% of the 493 licenses auctioned, thus precluding the acquisition of a truly national footprint. The most successful C block bidder, NPCI, acquired only 56 licenses in the initial auction and an additional seven licenses in the reauction. By contrast, AT & T, Sprint and Nextel all covered virtually the entire nation through a combination of cellular, PCS, ESMR and other spectrum.

auction, in which 255 qualified bidders competed for 493 BTA licenses, was far more competitive than the D/E/F block auction, in which 153 qualified bidders competed for 1,479 BTA licenses, and that the prices bid for the C block licenses were exponentially higher than the prices bid for the D/E/F block licenses on a comparative MHz-Pop basis. The difference in the nature and competitiveness of the two auctions may explain *why* the C block bid prices were higher than the D/E/F block prices,[11] but *why* is not the issue. The issue before the Court is whether the C block licenses were sufficiently comparable to the D/E/F block licenses that the prices bid in the D/E/F block auction reflected a revaluation of the C block licenses *as perceived in the marketplace.*

[11] Many reasons for the radical decline in the perceived value of PCS spectrum were suggested at trial, including the difference in business opportunity emphasized by the FCC experts, the proposition that the C block bidders simply misjudged the market and grossly overbid in a frenzy of speculation, the sharp decline in the stock market prices of other companies in the wireless telecommunications business during the latter half of 1996 (the stock of OmniPoint, described by a witness as the "poster child" of public wireless operators, lost three-quarters of its value from May 1996 to April 1997) and the widespread concern or belief that the FCC had determined to remove the scarcity factor from the value of PCS and other wireless spectrum by flooding the market with spectrum through the D/E/F block auction and the auctions in 1997 for ESMR, WCS and LMDS spectrum, all of which were announced in the latter half of 1996. Undoubtedly all of these factors contributed to the decline in the perceived value of spectrum for wireless telecommunications.

On this issue it was Dr. Salant's view that the C block prices might have been just as high if that auction had been held in early 1997. He stated:

> Indeed, there is little reason to believe that had the C block auction been run, say over two or three months ending in January or February of 1997, with the same sets of bidders and the same initial eligibilities, that prices would have been much different. (Salant Report 30)

The evidence refuted that supposition. Of course, there was no auction for C block licenses in early 1997, but there was a market to test the value of those licenses—the market for public financing. If the market had indeed perceived the value of the C block licenses in January/February 1997 to be what the auction winners bid in May and July 1996, there is no reason to doubt that NextWave and the other C block licensees would have succeeded in raising the $1.6 billion of debt and equity they needed in the public market. The trial testimony on this issue of the NextWave representatives and their independent investment bankers was entirely credible. That evidence demonstrated that by January 1997 the market did not believe in the values bid in the C block auction. In meetings with the investment banking community, these witnesses found that the primary obstacle to funding NextWave's capital requirements was the perception based on the D/E/F block auction that the cost of the C block licenses was grossly excessive and that NextWave could not compete with that cost structure and debt burden. Despite the best efforts of these witnesses and others to convince the financial markets that C block licenses were different from and far more valuable than D, E

and F block licenses (using many of the same arguments advanced by the FCC at trial), they failed to do so, and no C block licensee could obtain any public funding.

Thus, lack of comparability of the two auctions may explain why the C block bid prices were higher than the D/E/F block prices, but it does not answer the question whether the D/E/F block auction and other factors such as mentioned in footnote 11 undermined the market value of the C block licenses. The fact is that the market's perception of the value of PCS licenses had changed by 1997. The FCC's 1999 reauction of C, E and F block licenses (predominantly C block licenses) demonstrated that the market value of this spectrum has declined even further.

The FCC challenged the comparability of the C block licenses and the D/E/F block licenses in only one respect—capacity. The FCC's experts presented a plethora of data designed to show the differences in capacity of a 30 MHz C block license and a 10 MHz D/E/F block license. They demonstrated that 10 MHz of spectrum is divisible into three usable channels, while 30 MHz can support eleven channels. With the sustained and rapid growth in mobile telephone ownership and usage and the likely advent in the coming years of "local loop service" and wireless data transmission,[12] capacity provided by 10 MHz will become insuf-

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[12] "Local loop service" refers to customer usage of wireless mobile telephones in virtual replacement of traditional stationary telephones in the home and office. The experts do not anticipate that local loop wireless service will supplant traditional fixed point telephones unless and until monthly rates for wireless usage are brought down to levels competitive with high volume usage (say,

ficient to service demand. The debtor's witnesses countered by pointing to the sufficiency of 10 MHz for operations in even the most populous markets even today, more than two years after the February 1997 valuation date, and the virtual certainty that a continuation of market adjustments[13] and technological improvements and innovations[14] to increase 10 MHz capacity, known to the market in late 1996 and early 1997, will substantially accommodate all but the most radical increases in demand that might be expected six, seven or eight years in the future. Any capital costs to be incurred five or more years in the future to implement technological innovations to increase 10 MHz capacity must be weighed against the immediate and ongoing capital cost of carrying, or "warehousing," 30 MHz of capacity more than two-thirds of which is not needed now and which may become technologically obsolete before it is ever put to use.

1,000 minutes or more per month) on fixed point telephones. With existing technology, wireless transmission of data uses a great deal of spectrum capacity. But, there is little demand for wireless transmission of data today, and the evidence at trial would not support any finding as to the likelihood of a material increase in demand for wireless data transmission within the next five years.

[13] Since capacity planning must be geared to maximum demand on a telephone system, the quantification of peak demand is an essential factor in capacity. The FCC's experts quantified peak demand at 12 1/2% in calculating when 10 MHz capacity might be exhausted in the future. The debtor's witnesses countered by pointing out that the 12 1/2% figure was predicated on historic mobile telephone usage during commuting hours, primarily at the end of the day, when most mobile phones were car phones. The advent of small, highly portable mobile phones has not only increased overall wireless telephone usage, it has also spread that usage over the entire day and weekends, thereby decreasing the peak demand factor to 8 1/2% despite the increase in overall wireless usage.

[14] Such technological improvements include the greater efficiencies resulting from the various digital technologies (the most efficient of which appears to be CDMA), which may be replaced by even greater efficiency of 3G technology; utilization of eight kilobit EVRC vocoders in place of 13K vocoders; utilization of six sector in place of three sector antennae.

Considering all of the evidence, I conclude as a matter of fact and law that the C block licenses were substantially comparable to the D/E/F block licenses in February 1997 for purposes of determining the value of the former based upon the auction prices of the latter. The D/E/F block auction determined the fair market value of those licenses as of the time of the auction. The D/E/F block auction concluded precisely at that point in time when the C block licenses are to be valued. The C block licenses are functionally identical to and interchangeable with the D/E/F block licenses in every respect, save only capacity. All 493 licenses in each of the C, D, E and F blocks covered precisely the same geography and population in the same BTAs. With respect to capacity, the undisputed evidence showed that even at the time of trial in April 1999 no PCS operator is using more than 10 MHz of spectrum in even the most densely populated BTA; indeed, no PCS operator is using more than two of the three channels available in 10 MHz in any BTA. Knowledgeable participants in the PCS market and their financiers knew in February 1997 that demand might exceed 10 MHz capacity in the most populous BTAs at some point in the perhaps distant (five years or more) future, and they also knew that technology existed even then which might expand 10 MHz capacity to meet any reasonably projected demand. These findings do not mean that there was no difference between 10 MHz and 30 MHz of

spectrum; they do mean that the C block licenses and the D/E/F block licenses were comparable for market valuation purposes, subject to appropriate adjustment for the capacity difference between 30 MHz and 10 MHz which might or might not become material at some point in the future depending upon market conditions, which might increase demand beyond 10 MHz capacity, and technological advances, which might expand 10 MHz capacity to meet demand.

Accordingly, I conclude that Mr. Kern's market comparable analysis is an appropriate method of determining the value of C block licenses in February 1997, subject to appropriate adjustments, discussed below.

The market comparable method of valuation satisfies two key legal requirements. First, valuation by reference to actual market prices in a public auction open to every potential purchaser in the marketplace and conducted under FCC regulations designed to provide every bidder with maximum possible competitive information establishes "fair market value" of the property auctioned as a matter of law. *Keener v. Exxon Co., USA*, 32 F.3d 127, 132 (4th Cir. 1994), *cert. denied*, 513 U.S. 1154, 115 S. Ct. 1108, 130 L.Ed.2d 1074 (1995) (bid price equated to fair market value). The *Keener* court explained:

> [F]air market value is, by necessity, best set by the market itself. An actual price, agreed to by a willing buyer and willing seller, is the most accurate gauge of the value the market places on a good. Until such an exchange occurs, the market value of an item is necessarily speculative.

Id. (citing *Amerada Hess Corp. v. Commissioner of Internal Revenue*, 517 F.2d 75, 83 (3d Cir. 1975)). "[W]hen a third party makes an offer in cash, or its equivalent, for an item, a 'court can justifiably infer that the amount of an arms' length offer represents the value of the [asset]." *Id.* at 132 n.5 (citing *Ellis v. Mobil Oil*, 969 F.2d 784, 786 (9th Cir. 1992)). Fair market value is the price which a willing buyer would pay a willing seller in an arm's length transaction, where both the buyer and seller have reasonable knowledge of the relevant facts and neither is under compulsion to complete the transaction. *See BFP v. Resolution Trust Corp.*, 511 U.S. 531, 548, 114 S. Ct. 1757, 128 L.Ed.2d 556 (1994); *In re Grigonis*, 208 B.R. 950, 955 (Bankr. D. Mont. 1997). *See also, In re Prince Gardner, Inc.*, 220 B.R. 63, 66 (Bankr. E.D. Mo. 1998) (citing *BFP*, 511 U.S. at 548, 114 S. Ct. 1757 ("[i]n the vast majority of asset transfers other than real estate foreclosure sales, the Bankruptcy Courts can determine worth and reasonably equivalent value by referring to the common-law notion of fair market value")); *see also Barber v. Golden Seed Co., Inc.*, 129 F.3d 382, 387 (7th Cir. 1997); *In re R.M.L. (Mellon Bank v. Official Committee of Unsecured Creditors)*, 92 F.3d 139, 149 (3d Cir. 1996); *In re Ozark Restaurant Equipment Co., Inc.*, 850 F.2d 342, 345 (8th Cir. 1988); *In re Colonial Realty*, 226 B.R. 513, 523 (Bankr. D. Conn. 1998); *In re O'Neill*, 204 B.R. 881, 887 (Bankr. E.D. Pa. 1997) (reasonably equivalent value means fair market value outside foreclosure context); *In re Grigonis*, 208 B.R. at 955. Fair market value, as defined by Mr. Kern in his Report and as established in the D/E/F block auction, is the legal standard for determining value in a proceeding to determine whether there has been a constructive fraudulent conveyance. *Morris Communications*, 914 F.2d at 469

(quoting *United States v. 100 Acres*, 468 F.2d 1261, 1265 (9th Cir. 1972)) ("[T]he method of 'comparable sales' in the relevant time frame is 'more appropriate than any other method in determining market value of the property.'"); *El Paso Natural Gas Co. v. Federal Energy Regulatory Comm'n*, 96 F.3d 1460, 1464 (D.C. Cir. 1996) ("evidence of contemporaneous sales of comparable properties is generally the preferred method of valuation"); *In re Martin-Trigona*, 760 F.2d 1334, 1345 (2d Cir. 1985); *Cowen v. Guidry*, 274 F. Supp. 22, 24 (E.D. La. 1967) (there is no justification for using income approach to fair market value where comparable sales are available); *In re General Industries, Inc.*, 79 B.R. 124, 128 (Bankr. D. Mass. 1987) (under the circumstances at issue the court found the "market data method is the most practical method approach to valuation"); *In re Thompson*, 18 B.R. 67, 70 (Bankr. E.D. Tenn. 1982) ("It is generally recognized that comparable sales in the vicinity of the subject property produce the best guides to determine fair market value").

Second, the market comparable method comports with the requirement that value be determined in bankruptcy proceedings by an objective standard. *In re Independent Clearing House Company*, 77 B.R. 843, 859 (D. Utah 1987); *In re Taubman*, 160 B.R. 964, 986 (Bankr. S.D. Ohio 1993); *In re Morton Shoe Companies, Inc.*, 24 B.R. 1003, 1009 (Bankr. D. Mass. 1982); *In re Richardson*, 23 B.R. 434, 444 (Bankr. D. Utah 1982); *In re Checkmate Stereo and Electronics, Ltd.*, 9 B.R. 585, 591 (Bankr. E.D.N.Y. 1981), *aff'd*, 21 B.R. 402 (E.D.N.Y. 1982).

The same conclusions cannot be reached with respect to the DCF method of valuation relied upon the FCC. The DCF method suffers from four fundamental defects for purposes of valuing the C block licenses in this proceeding.

First, the income method of analysis values an enterprise as a totality; it does not value any particular element of property within the enterprise. A PCS license by itself cannot generate any income. Only an enterprise can generate income, and the enterprise consists of congeries of assets, management, a business plan, production and service employees and financing, and the enterprise exists in the context of a marketplace consisting of customers, competitors and regulators. Every element just mentioned has associated with it a number for every point in time, and all of those numbers must be included in the DCF model to calculate a value. The value so determined is the value of the enterprise, not any particular asset within it.

Second, in a case such as this the constituent elements incorporated in a DCF model for the mathematical calculation of value are not objectively ascertainable facts in the real world, as are comparable sales and market prices. Every single line item in Dr. Salant's DCF model is an assumption utilized to calculate a projection, from which is mathematically extrapolated a net present value. The gap in reliability between objectively verifiable facts used in the market comparable methodology and the assumptions used in this kind of DCF analysis is compounded in the case of a start-up enterprise such as NextWave, where there is no record of historical performance on which to base assumptions for future projections. *See, Langham, Langston &*

Burnett v. Blanchard, 246 F.2d 529, 532 (5th Cir. 1957) (valuation of a company as a going concern is inappropriate when the business is wholly inoperative or on its deathbed); *In re Fred D. Jones Co.*, 268 F. 818 (7th Cir. 1920), *cert. dismissed, Heldman v. Central Trust Co. of Illinois*, 257 U.S. 664, 42 S. Ct. 45, 66 L.Ed. 424 (1921); *In re Art Shirt Ltd., Inc.*, 93 B.R. 333, 341 (E.D. Pa. 1988) (to treat a wholly inoperative or defunct company "as a going concern would be misleading and would, in fact, fictionalize the company's true financial condition"); *In re Bellanca Aircraft Corp.*, 56 B.R. 339, 387 (Bankr. D. Minn. 1985). The problem is exacerbated with the DCF analysis relied upon by the FCC in this case. The textual description of Dr. Salant's DCF model at pages 42-46 of the Salant Report and in the three remarkably spare spreadsheets comprising Exhibit F to that Report are by no means self-explanatory, intuitively comprehensible or objectively verifiable by the trier of fact. We know only that the DCF model was created by Dr. Salant and his assistants and, as to the sources of their assumptions, the statement: "Besides our own experience, our analysis used industry sources and NextWave documents to form projections of key variables such as penetration and average revenue per user." (Salant Report 44-45)[15]

[15] The reason for concern as to the reliability of a valuation predicated entirely on unverifiable, subjective assumptions is readily illustrated. For example, a variation of 1% in the presumed weighted average cost of capital (WACC) results in a $500 million change in the value calculated by Dr. Salant's DCF model. Changing the assumption of wireless competitors from six to five increases Dr. Salant's calculation of value by $1.5 billion. The modification of the "retail base case" value of $2.5 billion to produce the "wholesale base case" of $3.3 billion (relied upon by the FCC as the value of NPCI's 63 C block licenses) by the simple

Third, whatever uncertainties one may have with regard to the assumptions built into the DCF model by Dr. Salant and his associates, there can be no uncertainty that one key assumption of the model conflicted with reality. The model assumed the existence of financing to build out the necessary infrastructure to conduct a PCS wireless business using C block licenses. In the real world, however, not a single C block licensee was able to obtain financing to build out its system, precisely because of the financial community's concern as to the value of the C block licenses. This single fact undermines the utility of the model. It is not an answer to say that the model is designed to demonstrate a hypothetical value, because the law requires a determination of fair market value, not hypothetical value.

Finally, as acknowledged by Dr. Salant his DCF methodology is not designed to produce a calculation of "fair market value" as defined by appraisers and the courts. Dr. Salant disclaimed fair market value as a concept employed by economists and as an objective of DCF analysis. Dr. Salant's concept of value is something quite independent of the price which a fully informed seller and buyer would accept and pay in an arm's length, unconstrained transaction. DCF analysis is undoubtedly an essential tool for economists and financial analysts to assess risk in a proposed transaction or strategy by calculating the differences in value produced by manipulating the assumptions built into the model. But such "values" are hypothetical and cannot be used to supplant the market comparable method

expedient of deleting from the model all costs associated with retail appears to implicate the anomalous result of a negative value of $800,000 associated with the retail side of the business.

to determine current "fair market value" in circumstances, such as presented here, where market value can be determined by reference to the prices paid in actual, contemporaneous transactions involving comparable properties.[16]

For the foregoing reasons, I must reject the DCF methodology relied upon by the FCC.[17]

D. *Conclusions on Value*

This Court's decision on the FCC motion for partial summary judgment left open the question whether the C block licenses should be valued with an effective date as of January 3, 1997, the date on which the FCC issued its ruling conditionally awarding the C block licenses to NPCI, or February 19, 1997, the date on which NPCI executed and delivered the Notes to the FCC. I conclude as a matter of law that February 19 is the appropriate date for valuation, because it was not until NPCI complied with its purchase price obligation by

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[16] In other circumstances the income method of valuation may be preferred, such as where there are no truly comparable transactions and income is objectively verifiable as a basis to determine present value based on highly reliable projection of future net income.

[17] Mr. Kern's reasons for rejecting the income approach to valuation were concisely stated in his Report at page 43:

> The income approach was considered but not utilized because of the uncertainty in projecting typical build-out costs, subscriber growth, operational expenses, changes in ARPU [average revenue per user], effects of competing technologies and numerous other factors necessary for a start- up company in a developing industry. Additionally, the income approach assumes a fully financed company holding the licenses and an operating network generating cashflow.

delivering the Notes that the transfer occurred and the obligation was incurred.

As noted above, the Kern Report valued NPCI's 63 C block licenses at $810,400,000 based on the prices bid at the D/E/F block auction after giving effect to certain adjustments to the latter prices to reflect differences between the respective licenses. The FCC experts took exception to these adjustments in several respects, each of which will be considered.

Competition Adjustment. The FCC argued that there should be a "competition" adjustment because of the fact that the C block auction was more competitive than the D/E/F block auction (far more bidders, having submitted far higher upfront payments, competing for one-third the number of licenses). The argument must be rejected for two reasons. First, as explained above the market comparable approach looks not to the comparability of sales events but to the comparability of the things being sold. Thus, there is no need to make adjustment to reflect differences between the auctions. Second, it is self-evident that the difference in competitiveness between the two auctions is fully reflected in the differences in the prices bid—indeed, the bid differential is precisely the consequence of the greater competitiveness of the C block auction.

30 MHz/10 MHz Multiple. Although 10 MHz provides sufficient capacity presently and, in many or most BTAs, for the indefinite future, there is little doubt that 30 MHz capacity may have significant economic value in years to come in high population BTAs, for which NPCI holds eleven C block licenses. This would suggest an adjustment of 3 to 1 for the eleven high Pop licenses and no adjustment (*i.e.*, a 1 to 1 ratio) for the 52 licenses

where 30 MHz appears unlikely to add value to a 10 MHz license. Technological arguments exist which may justify a higher than 3 to 1 ratio (*e.g.*, eleven channels for 30 MHz versus three channels for 10 MHz suggests a 3.67 to 1 ratio; "trunking factor" suggests a 4.5 to 1 ratio). However, applying even a 4.5 to 1 ratio to the eleven high Pop licenses and a 1 to 1 ratio for the remaining 52 licenses produces a total value for all 63 licenses materially lower than $810.4 million. Considering all the factors bearing on the issue, I conclude that there is no basis to select an adjustment different from the 3 to 1 ratio which Mr. Kern applied to all 63 licenses.

Cost of Capital. C block licensees enjoyed significant advantages in respect of financing their purchase price obligations to the FCC, described above. F block licensees enjoyed different financing advantages, also described above, and D and E block licensees were required to pay the FCC in full in cash for their licenses. To adjust for the financing differentials Mr. Kern used an interest rate of 11.75%, being the median value of 1996 debt offerings of seven other PCS and cellular operators. However, all seven of the issuers, including Sprint and Western Wireless Corp., were relatively well-established, operating companies. Weighing the conflicting testimony of the experts and other evidence, I conclude that 11.75% represented an overly optimistic cost of money for a development stage company such as NextWave in February 1997, and that 14% is a more reasonable adjustment to reflect the financing advantages of the C block licenses compared with the D, E and F block licenses.

Percentage of Favorable Financing Adjustment. Although he concluded that an adjustment was necessary to reflect the favorable financing available to C block licensees, Mr. Kern applied only 60% of that adjustment, rather than 100% necessary to realize full equalization, reasoning that a purchaser of C block licenses in February 1997 probably would not be willing to pay an amount sufficient to reflect 100% of the financing differential. I agree with the FCC experts that the financing adjustment should be taken at 100% in order to fully reflect the value of the C block licenses where that value is to be derived from a comparison with the D, E and F block licenses.

Summary. Near the conclusion of the trial at the Court's request Mr. Kern recalculated the value of the 63 NPCI C block licenses in accordance with his market comparable methodology but utilizing a variety of different assumptions on the disputed adjustments, discussed above (*see* Plaintiff's Trial Exhibits 136, 143). Using February 19 as the effective date for valuation and applying the Court's conclusions with respect to the adjustments discussed immediately above (*i.e.*, a 3 to 1 ratio to reflect the MHz differential, a 14% cost of capital and 100% of the favorable financing differential) results in a calculation of $908,146,000 (*see* Exhibit 136 sheet 6, Exhibit 143 sheet 4). Accordingly, it is this Court's ruling that $908,146,000 was the fair market value of NPCI's 63 C block licenses as of February 19, 1997. By any standard this did not constitute reasonably equivalent value for $4.6 billion of Transfers.

Under this ruling the $908,146,000 figure represents the fair market value of 100% of the debtor's C block licenses. As such, it does not take account of the Court's ruling under section II.A., above, that the 3% Payment of $142,309,000 constituted a fair exchange of

value not subject to avoidance under Section 544. It is necessary to give effect to both rulings in calculating the total amount of NPCI's $4.7 billion of Transfers that is subject to avoidance under the statute. To this end it is appropriate to take 97% of the $908,146,000 figure, or $880,902,000, and add back the 3% Payment of $142,309,000. The sum, $1,023,211,000, may be said to constitute the fair market value of the entire consideration received by NPCI in exchange for the entire $4.7 billion of Transfers, for purposes of fraudulent conveyance analysis. The result of subtracting $1,023,211,000 from the $4,743,648,000 of total Transfers is $3,720,437,000, representing that portion of the total Transfers subject to avoidance under 11 U.S.C. §§ 544, 548 and 550.

The Court will conduct a further hearing to consider the question of remedy at the parties' earliest convenience.

APPENDIX K

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Bankruptcy No. 98 B 21529(ASH)
Adversary No. 98-5178A

IN RE NEXTWAVE PERSONAL COMMUNICATIONS, INC., ET AL., DEBTORS

NEXTWAVE PERSONAL COMMUNICATIONS, INC., PLAINTIFF

v.

FEDERAL COMMUNICATIONS COMMISSION, DEFENDANT

Feb. 16, 1999

DECISION ON PARTIAL SUMMARY JUDGMENT MOTION

ADLAI S. HARDIN, JR., Bankruptcy Judge.

Nextwave Personal Communications, Inc. ("Nextwave" or "debtor") commenced this adversary proceeding to set aside its aggregate $4.7 billion of transfers and obligations to the Federal Communications Commission ("FCC") incurred in its acquisition of 63 broadband Personal Communication Services licenses ("C Block licenses") as a constructive fraudulent conveyance under 11 U.S.C. § 544(b). The FCC has moved for partial summary judgment under Bankruptcy Rule

7056(b) to determine the effective date of Nextwave's $4.74 billion of transfers and obligations for purposes of Section 544(b). As set out below, I find that the effective date of the debtor's $4.74 billion of transfers and obligations under Bankruptcy Code Section 544 is January 3, 1997.

Jurisdiction

This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334(a) and 157(a) and the standing order of reference of Acting Chief Judge Robert J. Ward dated July 10, 1984. This adversary proceeding is a core proceeding under 28 U.S.C. § 157(b)(2)(H).

Undisputed Facts

The following facts are undisputed by the parties. The FCC conducted an auction of C Block licenses from December 18, 1995 to May 6, 1996, and a reauction of C Block licenses from July 3 to July 16, 1996. The debtor participated in the bidding in both of these auctions and was declared the high bidder on May 8, 1996 for 56 C Block licenses and on July 23, 1996 for an additional 7 reauctioned C Block licenses, for a total of 63 C Block licenses.

As part of the FCC's auction process, bidders were required to deposit "qualifying amounts" in order to participate in the auction. The debtor deposited qualifying amounts of $79,225,000 on December 1, 1995 and $6,984,244 on June 13, 1996. After the debtor was declared the winning bidder on May 6, 1996 as to the 56 C Block licenses, it deposited an additional $130,834,333 on May 10, 1996 and further deposit of $20,138,825 on July 23, 1996 when it was declared the winning bidder

for the 7 C Block licenses. The debtor's deposits at the close of the bidding process totalled $237,182,402, or approximately 5% of the $4.7 billion it bid for all 63 C Block Licenses.

Following the close of the auction process, FCC regulations required the debtor to submit applications for approval of the issuance of the 63 C Block licenses. The debtor submitted applications as to the 56 and 7 C block licenses on May 22 and July 17, 1996, respectively. While these applications were pending, two rival bidders, Antigone Communications L.P. and PCS Devco, Inc., petitioned the FCC to deny the debtor's applications on various grounds. The FCC investigated the matter and found that certain elements of NextWave's capital structure exceeded statutory foreign ownership benchmarks. In response, the debtor filed a restructuring plan with the FCC on December 30, 1996 to bring its capital structure into compliance with FCC regulations. On January 3, 1997, the FCC conditionally granted licenses for all 63 C Block licenses, subject to the debtor's implementation of its proposed capital restructuring plan.

Following the FCC's January 3, 1997 license grant, the debtor was required to deposit an additional 5% of the total $4.74 billion bid price, or a further $237 million. The debtor deposited this additional amount on January 9, 1997, raising its total deposits to $474 million. On February 19, 1997 the debtor signed notes dated January 3, 1997 in the aggregate principal amount of $4.27 billion (the "Notes") for the balance of the $4.74 billion it bid at auction.

Discussion

The parties dispute the date on which the debtor incurred its $4.74 billion obligation to the FCC. That date is relevant for purposes of the debtor's avoidance claim under Bankruptcy Code Section 544(b), which provides in pertinent part:

> The trustee may avoid any transfer of an interest of the debtor in property *or any obligation incurred* by the debtor that is voidable under applicable law . . .

11 U.S.C. § 544(b) (emphasis added). Because the FCC has moved only for a determination of that date, this decision is limited to a finding of fact and conclusion of law as to that date and does not address any remaining factual or legal issues regarding the debtor's Section 544 claim.

The FCC argues that the debtor incurred its obligations when "the hammer fell" at the C Block auctions on May 8 and July 23, 1996. The debtor argues that it did not incur the obligations at issue in this proceeding until at least January 3, 1997,[1] the date on which the FCC conditionally granted the licenses and the effective date of the Notes.

The resolution of this motion must follow from identifying precisely which obligation the debtor seeks to avoid. Stripped to its essential proposition, the debtor's

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[1] While it did not actually execute its Notes for the balance of its bid until February 19, 1997, the debtor does not contest using the effective date of the Notes, January 3, 1997. (Debtor's Memorandum at 8, note 2).

Section 544 claim is that it did not receive reasonably equivalent value in the C Block licenses it was granted in return for its $4.74 billion obligations. To measure the reasonable equivalence in value of the C Block licenses and the obligations incurred therefor, one must ask (i) when did the debtor receive the licenses and (ii) when did it become obligated to pay for them. These questions are determined by the rules governing the auction itself. *See In re Wilson Freight Co.*, 30 B.R. 971, 975 (Bankr. S.D.N.Y. 1983) (announced terms of auction binding upon participants). Those rules are found in the FCC regulations governing the auction process at 47 C.F.R. §§ 1.2101-1.2111, entitled "Subpart Q, Competitive Bidding Process."

With regard to question (i), both sides agree that the winning bidder neither received nor became entitled to receive the C Block licenses upon being declared the winning bidder under the FCC regulations. The winning bidder must apply to the FCC, complete the regulatory approval process and perhaps (as in this debtor's case) overcome objections. The winning bidder has no legal right to receive or utilize the licenses bid upon unless and until its application is approved by the FCC. All the debtor received on May 8 and July 23, 1996 when it was declared high bidder was the exclusive right to apply for the 63 licenses. As stated by the FCC's counsel at a hearing in this Court on January 28, 1999 (Tr. at 15):

> THE COURT: Wait a second. You're asking for words, namely, "reasonably equivalent value" and that raises a question of value for what? And equivalent to what?
>
> MS. SCHWARTZ: To what they got.

THE COURT: What did they get?

MS. SCHWARTZ: What they got was the right to apply for these licenses that were essential to their business. And without those licenses, they would have no business.

Thus, the debtor did not become entitled to receive the 63 C Block licenses until at the earliest the January 3, 1996 decision of the FCC granting the debtor's applications.

Under FCC regulations, once bidding has ended the FCC must notify the high bidder and declare bidding closed. 47 C.F.R. § 1.2107(a). Within five days of the notification, the winning bidder who is a "qualified designated entity" (as is the debtor) must bring its total deposits up to 10% of its bid as a downpayment. 47 C.F.R. § 1.2107(b). Significantly, once the downpayment is tendered, the FCC holds the downpayment:

> until the high bidder has been awarded the license and has paid the remaining balance due on the license, in which case it will not be returned, or until the winning bidder is found unqualified to be a licensee or has defaulted, in which case it will be returned, less applicable penalties.

Id. In other words, one of three events must occur after the winning bidder tenders the downpayment but before award of the license: either the winning bidder pays the balance of the bid, in which case the downpayment is applied toward the license, or the winning bidder defaults, or the winning bidder is disqualified. Significantly, if the winning bidder defaults or is disqualified, although penalties may be assessed under

Section 1.2104, the downpayment must be returned net of any penalties.[2]

Nor is the obligation on the full amount of the bid fixed upon tender of the downpayment. A winning bidder who timely submits its downpayment must also submit a "long-form" application for license approval in its respective areas of service. 47 C.F.R. § 1.2107(c). If the bidder fails to timely submit its application, it is deemed to have defaulted and is subject to Section 1.2104 penalties. *Id.* The bidder's default subjects it to applicable penalties to be subtracted from the downpayment, but does not leave the bidder liable on the full amount of the bid.

These provisions make it clear that the debtor was not legally bound on the full amount of its winning bid upon being declared the high bidder. At the "fall of the hammer" the debtor did incur a potential liability in the event that it either defaulted or was disqualified (neither of which occurred in this case), but under the FCC regulations that potential liability was quite different from the amount of the winning bid.

The potential default liability incurred at the fall of the hammer consisted of penalties calculated on the basis of the difference between the winning bid and the winning bid at any subsequent reauction if any, plus applicable percentage penalties. *See* 47 C.F.R. § 1.2104. Nothing in this calculation explicitly or implicitly binds

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[2] It appears that one party in the bidding process, BDCPS, Inc., in fact failed to timely submit its downpayment, thereby defaulting, and was assessed a penalty in accordance with Section 1.2104, but there is no indication that the full amount of its high bid was assessed. (Exhibit J to debtor's Memorandum in Opposition).

the winning bidder to the full amount of its bid. Indeed, the express requirement that the downpayment be refunded less any penalties in the event of default or disqualification negates any implied liability for the full amount of the bid. The penalty obligations upon default or disqualification are entirely separate from—and mutually exclusive of—the obligations the bidder would incur upon granting of the license and tender of the balance of the bid. Whether the debtor might have been liable for any of these penalty amounts is not at issue.

Having determined that the debtor's liability for the full amount of the obligation did not attach upon its being declared the high bidder, nor upon tender of the downpayment or even submission of the license approval application, the issue remains as to when the full liability did attach.

The auction rules provide that the grant of a license is expressly conditioned upon payment of the balance of the obligation. Section 1.2109(a) provides:

> Unless otherwise specified in these rules, auction winners are required to pay the balance of their winning bids in a lump sum within five (5) business days *following award of the license. Grant of the license will be conditioned on full and timely payment of the winning bid.*

47 C.F.R. § 1.2109(a) (emphasis supplied). If the bidder fails to satisfy Section 1.2109(a), the license application is deemed dismissed, the bidder is liable for Section 1.2104 penalties against the downpayment, and the FCC may either reauction the license or offer it to the next highest bidder. 47 C.F.R. § 1.2109(b). Similarly, any bidder who is found unqualified, defaults in timely remitting the balance of the bid or is disqualified becomes liable for Section 1.2104 penalties, after which the FCC may conduct a new auction. *Id.* Taking these sections together, had the debtor failed to tender the balance or otherwise defaulted, it would have been liable only for the Section 1.2104 penalties against its downpayment. Thus the earliest date at which the debtor could have been liable for the full amount of its bid obligations is the date it complied with Section 1.2109(a) by paying the balance of its cash obligations and issuing the Notes. The debtor complied with Section 1.2109(a) effective at the earliest on January 3, 1996 by tendering the balance of its bids in cash and the Notes. It thereby became liable for the full amount of its bid obligations by reason of its Notes.

To summarize, under the FCC regulations it is clear that the debtor incurred a contingent liability for default by entering into the bidding process and by being declared the high bidder. However the contingent default obligations that the debtor might have incurred by participating in the bidding process (which were never actually incurred by the debtor) were quite different from the debtor's obligations for the full amount of its bids, which only became fixed upon its tender in cash and the Notes of the balance due on the C Block licenses granted on January 3, 1997. That obligation, not the contingent penalty obligations, is the subject of the debtor's Section 544 avoidance action.

It is apparent that the FCC's position on this motion is incongruent both with its own regulations and with the debtor's claim in this adversary proceeding. The

constructive fraudulent conveyance claim asserts that the aggregate consideration given by the debtor effective January 3, 1997 for the 63 licenses (*i.e.*, the cash transfers totalling $474 million and the Notes totalling $4.26 billion) was not reasonably equivalent to the value of the licenses granted on January 3, 1997. In arguing that May 8 and July 23, 1996 are the debtor's liability dates for valuation purposes, the FCC focuses not on the actual $4.7 billion purchase price which became effective January 3, 1997, but on the debtor's contingent exposure to default penalties which were never incurred and never could be incurred if the licenses were granted. Moreover, the property to be valued—the licenses—was not granted in May and June 1996, but on January 3, 1997.

For the foregoing reasons, I find as a matter of fact and law that the date upon which the debtor incurred its obligations to the FCC for purposes of Bankruptcy Code Section 544(b) is January 3, 1997.[3]

Counsel of the NextWave and the FCC are directed to confer and jointly prepare an order, agreed as to form, consistent with this decision, without prejudice to the FCC's right to appeal.

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[3] The January 3, 1997 date is based upon the date of the FCC's decision granting the licenses and constitutes the earliest effective date of the debtor's obligations for purposes of this adversary proceeding under Section 544. This ruling is without prejudice to the right of either party to argue that a later date should be determinative if the difference is material.

* * *

APPENDIX L

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Bankruptcy No. 98 B 21529(ASH)
Adversary No. 98-5178A

IN RE NEXTWAVE PERSONAL COMMUNICATIONS, INC., ET AL., DEBTORS

NEXTWAVE PERSONAL COMMUNICATIONS, INC., PLAINTIFF

v.

FEDERAL COMMUNICATIONS COMMISSION, DEFENDANT

Dec. 7, 1998

REVISED DECISION ON MOTION TO DISMISS

ADLAI S. HARDIN, JR., Bankruptcy Judge.

Defendant Federal Communications Commission ("FCC") has moved to dismiss this adversary proceeding for lack of subject matter jurisdiction.[1]

The First Amended Complaint of plaintiff-debtor NextWave Personal Communications, Inc. ("Next-

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[1] The District Court denied the FCC's companion motion to withdraw the reference, remanding the motion to dismiss to this Court for decision.

Wave" or the "debtor") contains two causes of action. The first alleges that NextWave's transfers to the FCC of deposits and secured promissory notes aggregating $4.7 billion in exchange for conditional grants of 63 C block lines on January 3, 1997 were constructive fraudulent conveyances subject to avoidance under 11 U.S.C. § 544. The second cause of action alleges that, by reason of the FCC's *de facto* control over NextWave and its "inequitable, unconscionable and unfair conduct" from the time of the C block auctions through the conditional grant of licenses on January 3, 1997, the FCC's liens and claims should be equitably subordinated to the claims of other creditors in the case, including intercompany and affiliate claims.

The motion to dismiss will be denied as to the first cause of action and granted as to the second. As amplified below, the first cause of action arises solely out of the FCC's status as a creditor of NextWave and does not seek to challenge any act or omission of the FCC or to affect the FCC in any manner except in its capacity as a creditor. By contrast, the second cause of action is based upon conduct of the FCC acting in its regulatory capacity. This Court will decline to review or adjudicate the consequences of the FCC's acts and omissions in matters over which Congress has granted the FCC primary jurisdiction.

Jurisdiction

This Court has jurisdiction over the debtor's Chapter 11 case by reason of 28 U.S.C. §§ 1334(a) and 157(a) and the standing order of reference dated July 10, 1984 signed by Acting Chief Judge Robert J. Ward. This Court's jurisdiction with respect to the claims asserted

in the adversary proceeding is the subject of this decision.

Background[2]

As set forth in the FCC's main memorandum, prior to Congress' enactment of Section 309(j) of the Federal Communications Act ("FCA"), the House Committee on Energy and Commerce (the "Committee") recognized that the radio frequency spectrum is a "precious but limited resource [that] has become vitally important to our economic success and social well being." *See* H.R. Rep. No. 103-11 at 247-48 (1993), reprinted in 1993 U.S.C.C.A.N. 378, 574-75. Noting that the congested state of the radio frequency spectrum limited the ability to accommodate new spectrum-dependent technologies and that existing procedures for issuing radio spectrum licenses by lottery and comparative hearings had resulted in regulatory inefficiencies and permitted licensees to exploit a national resource unjustly, the Committee concluded

> that a carefully designed system to obtain competitive bids from competing qualified applicants can speed delivery of services, promote efficient and intensive use of the electromagnetic spectrum, prevent unjust enrichment, and produce revenues to

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[2] The facts set forth below are drawn from the parties' briefs and the First Amended Complaint. The factual recitation which follows does not constitute "findings of fact" but is intended to provide the factual matrix giving rise to the parties' dispute in order to give context for the decision below. While the parties may differ on particular points of fact referred to herein, it is the Court's view that such differences would not be material to the ultimate factual and legal issues presented on this motion to dismiss.

compensate the public for the use of the public airwaves.

Id. at 580.

In section 309(j) of the FCA Congress authorized the FCC to issue radio spectrum licenses to various categories of qualified applicants through a system of competitive bidding. 47 U.S.C. § 309(j)(1), (2). Among the categories of applicants, the FCC was directed by the statute to designate portions or "blocks" of the radio spectrum for auction to small, emerging businesses and to establish flexible, deferred license payment plans to enable such enterprises to participate in the communications industry. 47 U.S.C. § 309(j)(3)(B) and (4)(D). Consistent with this mandate, the FCC designated the C block for auction to small businesses providing Personal Communications Services ("PCS"), a new form of wireless communication technology.

On May 6 and July 16, 1996, the FCC conducted its C block auctions, in which some 90 bidders won the right to apply for 493 C block licenses at bid prices aggregating $10.2 billion. As mandated by the statute, successful bidders were obligated to pay 10% of their winning bids in cash and to pay the remaining 90% to the FCC in deferred installments. Consistent with the statutory mandate, the FCC enacted regulations authorizing payment of the remaining 90% over a period of ten years, with interest only for the first six years and principal and interest for the remaining four years. 47 C.F.R. § 24.711(b)(3). Below-market interest rates were provided to enable start-up companies to obtain financing through capital markets or private placement in order to make debt payments to the FCC and to "build out" their PCS networks.

NextWave is a start-up company organized to take advantage of the opportunities provided by section 309(j) in the fledgling PCS industry. NextWave was high bidder for a total of 63 C block licenses for amounts aggregating approximately $4.7 billion. As required, NextWave made 10% downpayments aggregating some $474 million. In late May and late July 1996, following the auctions in those months, NextWave submitted applications for the C block licenses upon which it was the winning bidder for review and approval by the FCC.

On September 17, 1996, C block licenses were granted to over 90% of the parties who had earlier been designated as making high bids for licenses in the C block. The FCC did not grant approval for NextWave's 63 C block licenses until January 3, 1997. Shortly thereafter, NextWave received from the FCC a series of promissory notes made payable to the FCC (the "Notes") aggregating $4.26 billion, representing the remaining 90% of the amount bid by NextWave for its C block licenses. NextWave executed the Notes on February 19, 1997.

On June 26, 1996 the FCC announced the date for commencement of the D, E and F block auctions, which were held on August 26, 1996 and concluded in January 1997. These blocks covered geographical areas across the country, including areas covered by the 63 C block licenses for which NextWave was awaiting FCC approval. The winning bids on the D, E and F block auctions were at a fraction of the winning bids in the C

block auction.[3] The drastic devaluation in the C block licenses, as reflected in the values of the subsequently bid D, E and F block licenses, is the central factor in the NextWave bankruptcy filing and in the debtor's adversary proceeding against the FCC.

As a consequence of the gross disparity between the values of the C block licenses and those of the D, E and F block licenses, many if not most or all of the C block licensees experienced great difficulty in obtaining necessary financing. As stated in the FCC memorandum:

> In early 1997, the FCC received several requests from C block licensees for relief from their installment payments that described a range of difficulties in accessing the capital markets. . . . The FCC's Wireless Telecommunications Bureau ("Wireless Bureau") also received several proposals from C block licensees regarding alternative financing arrangements, as well as a petition for rulemaking regarding C block installment payments. In response to these requests, the FCC suspended the C block installment payments indefinitely, and initiated an elaborate administrative process for restructuring the C block license obligations.

[3] The C, D, E and F block radio spectrum licenses were allocated in specifically identified geographical areas, referred to as "Basic Trading Areas" ("BTAs"). A significant factor in the value of PCS licenses is the population or number of people served by the license, referred to colloquially as "Pops." Another variable in the value of a license is the carrying capacity of the wireless spectrum covered by the license, expressed in number of megahertz ("MHZ") of radio frequency. The price paid for a license can be quantified in terms of dollars per MHZ per Pops, or $/MHZ-Pops. NextWave bid an average of $1.43/MHZ-Pops for the 63 C block licenses for which it was high bidder. By contrast, the winning bids for the D, E and F block auctions reflected an average value of approximately $.35/MHZ-Pops for D and E block and $.246/MHZ-Pops for F block licenses.

After issuing public notice seeking comments, receiving over 160 filings in response, conducting a public forum in Washington, D.C. and reviewing further submissions thereafter, on October 16, 1997 the FCC issued a "Restructuring Order" which provided distressed C block licensees with four distinct, mutually-exclusive options regarding financial relief for C block licensees. In response to the Restructuring Order, the FCC received numerous petitions for reconsideration, oppositions, replies and *ex parte* filings. On March 24, 1998 the FCC issued a "Reconsideration Order," in which the FCC left intact the basic framework of the Restructuring Order, modifying it only slightly to allow licensees somewhat more flexibility in making their choices available under the Restructuring Order. The Restructuring Order and the Reconsideration Order are referred to collectively as the "Restructuring Orders."

On May 8, 1998 NextWave petitioned the FCC for further reconsideration of the Restructuring Orders, and on May 29, 1998 NextWave filed a petition for review of the Restructuring Orders with the District of Columbia Circuit Court. NextWave asked both the FCC and the Circuit Court for a stay of the June 8, 1998 deadline for its election of one of the four alternatives provided in the Restructuring Orders. Both the FCC and the Circuit Court denied NextWave's requests for stay of the June 8 deadline.

On June 8, 1998 NextWave filed its Chapter 11 petition together with the complaint in this adversary proceeding.

Discussion

The basic legal principles of jurisdiction governing the outcome of this motion are established by statute and are not controversial.

Congress has vested in the Circuit Courts of Appeals exclusive jurisdiction to enjoin, set aside, annul or suspend orders of the FCC. 28 U.S.C. § 2341(1) and 47 U.S.C. § 402. *See FCC v. ITT World Comms., Inc.*, 466 U.S. 463, 468, 104 S. Ct. 1936, 80 L.Ed.2d 480 (1984); *Wilson v. A.H. Belo Corp.*, 87 F.3d 393, 396 (9th Cir. 1996); *Media Access Project v. FCC*, 883 F.2d 1063, 1066 (D.C. Cir. 1989); *Bywater Neighborhood Ass'n v. Tricarico*, 879 F.2d 165, 167 (5th Cir. 1989), *cert. denied*, 494 U.S. 1004, 110 S. Ct. 1296, 108 L.Ed.2d 474 (1990). The regulatory jurisdiction conferred by Congress on a Federal agency and the grant of exclusive jurisdiction to the Circuit Courts to review the agency's actions precludes a district court (or, by reference, a bankruptcy court) from enjoining, reviewing, assessing damages for or otherwise adjudicating the consequences of the conduct of the Federal agency acting within the scope of its Congressional mandate. *See, e.g., FCC v. ITT World Comms., Inc.*, 466 U.S. at 468, 104 S. Ct. 1936 ("[l]itigants may not evade these [jurisdictional] provisions by requesting the District Court to enjoin action that is the outcome of the agency's order"); *Dougherty v. Carver Federal Savings Bank*, 112 F.3d 613, 620 (2d Cir. 1997) ("Where Congress has vested exclusive review of an agency action in the court of appeals, a district court cannot enjoin actions that are the

natural outcome of the agency's decision"); *Whitney National Bank v. Bank of New Orleans & Trust Co.*, 379 U.S. 411, 422, 85 S. Ct. 551, 13 L.Ed.2d 386 (1965); *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 69, 91 S. Ct. 203, 27 L.Ed.2d 203 (1970); *Pacific Power & Light Co. v. Bonneville Power Admin.*, 795 F.2d 810, 816 (9th Cir. 1986) (barring district court contract action as challenge to administrative rate determination solely reviewable by court of appeals); *Ordower v. Office of Thrift Supervision*, 999 F.2d 1183, 1188 (7th Cir. 1993) (district court did not have jurisdiction over action for breach of fiduciary duty which was, in substance, a challenge to an administrative ruling because the relief sought would "penalize action that the agency has approved or that is the natural outcome of the agency's decision"); *In re Olympia Holding Corp.*, 160 B.R. 185, 190-91 (N.D. Fla. 1993) (bankruptcy court had no jurisdiction over adversary proceeding that challenged Interstate Commerce Commission rule), *aff'd on other grounds*, 88 F.3d 952 (11th Cir. 1996).

Jurisdiction with respect to bankruptcy cases and proceedings is conferred by Congress on the district courts under 28 U.S.C. § 1334, which provides in subsections (a) and (b) as follows:

> (a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.
>
> (b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of

all civil proceedings arising under title 11, or arising in or related to cases under title 11.

Congress has authorized the district courts to refer jurisdiction over bankruptcy cases to the bankruptcy judges for the district, and bankruptcy judges may hear and determine all "core proceedings" arising under Title 11, including proceedings relating to fraudulent conveyances. Section 157 provides in pertinent part as follows in subsections (a) and (b):

> (a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.
>
> (b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.
>
> (2) Core proceedings include, but are not limited to—
>
> > (A) matters concerning the administration of the estate;
> >
> > * * * * * *
> >
> > (H) proceedings to determine, avoid, or recover fraudulent conveyances;

These statutory provisions confer upon the district and bankruptcy courts exclusive jurisdiction to admin-

ister the Bankruptcy Code and Rules and to resolve claims, adversary proceedings and contested matters arising under the Code. The role of the bankruptcy court is to adjudicate and adjust the rights of creditors and debtors in accordance with the Code. Nothing in section 309(j) of the FCA or any other statute confers any regulatory or other jurisdiction upon the FCC to make rules or other determinations with respect to its own status *as a creditor* vis-a-vis its debtors or other creditors of its debtors. No such jurisdiction is claimed by the FCC. By the same token, the Bankruptcy Code expressly recognizes the exclusive jurisdiction of regulatory agencies to perform the regulatory functions conferred upon them by statute. Thus, section 362 of the Bankruptcy Code governing the automatic stay, one of the centerpieces of the Code, provides an exception to the automatic stay in subsection (b)(4) for "an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power." However, as recognized by the FCC (Memorandum at ftn.5 p. 18), the FCC *in its capacity as a creditor* is subject to the Bankruptcy Code including the automatic stay. *See NLRB v. 15th Avenue Iron Works, Inc.*, 964 F.2d 1336, 1337 (2d Cir. 1992); *Matter of Fugazy Exp., Inc.*, 114 B.R. 865 (Bankr. S.D.N.Y. 1990), *aff'd*, 124 B.R. 426 (S.D.N.Y. 1991), *appeal dismissed*, 982 F.2d 769 (2nd Cir. 1992), *motion to vacate denied*, 159 B.R. 432 (Bankr. S.D.N.Y. 1993), *leave to appeal denied*, 163 B.R. 434 (S.D.N.Y. 1994).

The task on this motion is to determine whether the claims asserted against the FCC by NextWave affect NextWave in its capacity as a creditor, or require this Court to examine, pass judgment upon and attach legal consequences to the conduct of the FCC acting within

the regulatory jurisdiction conferred upon it by Congress.

The first cause of action

The first cause of action entitled "Fraudulent Conveyance of C Block Licenses to NPCI," paragraphs 63-70 of the First Amended Complaint, does not allege any regulatory conduct on the part of the FCC. It simply asserts that the "transfers" alleged in paragraphs 63-70, comprising the $475 million of deposits and the $4.26 billion of Notes executed by NextWave and transferred to the FCC, exceeded the value of the property received by NextWave from the FCC in exchange, namely, the 63 C block licenses, which are alleged to have had a value of less than $1 billion on February 19, 1997 when the Notes were executed by NextWave. The first cause of action seeks the equitable remedies of avoidance for the benefit of other creditors and the debtor available under 11 U.S.C. § 544. The claim asserted in the first cause of action is constructive fraudulent conveyance and implicates no conduct of the FCC. Whatever may be the merits of the first cause of action as a matter of bankruptcy law, this Court will not be called upon to adjudicate or attach any consequence to any act or omission of the FCC in its regulatory capacity. Congress has not vested in the FCC any regulatory power with respect to its status as a creditor or its rights to share with other creditors in the limited assets of its debtors. Nor has Congress deprived the district court or the bankruptcy court of jurisdiction under 28 U.S.C. §§ 1334(a) and 157(a) and (b) to hear and determine matters arising under Title 11, including 11 U.S.C. § 544.

The FCC argues that when Congress authorized it to allocate blocks of radio spectrum by competitive bidding "it was emphatic that the organization, execution and implementation of such auctions fell squarely within the agency's regulatory power" (FCC Memo p. 11). That is unquestionably so, but the first cause of action does not seek to litigate any issue with respect to the organization, execution or implementation of the radio spectrum auctions.

Quoting from Commission Susan Ness, the FCC argues that "the Commission's fundamental role is that of a licensing agency, not that of a lender . . . Those who say the [FCC] functioned as a banker are mistaken. . . . We never assumed the responsibility of creating 'commercially reasonable alternatives' for whatever difficulties the C block licenses [sic] encountered" (FCC Memo pp. 14-15). Commissioner Ness is, of course, correct in acknowledging that Congress never conferred upon the FCC "the responsibility of creating 'commercially reasonable alternatives' for whatever difficulties the C block licenses [sic] encountered"—indeed, Congress has provided in the Bankruptcy Code for the adjustment of creditors' rights and the fair allocation among creditors of the limited assets of a debtor. But Commissioner Ness is obviously incorrect in asserting, if that was her intent, that the FCC is not a creditor. There can be no dispute that the FCC is a creditor, and nothing in section 309(j) or elsewhere in the FCA or in the Bankruptcy Code states that the FCC is exempt from any of the provisions of the Code which affect it *as a creditor.*

At oral argument counsel for the FCC stated that the FCC's motion with respect to the first cause of action is

dependent on the Restructuring Orders. In essence, the position is that the Restructuring Orders constituted final administrative determinations establishing the four mutually-exclusive alternatives for NextWave to readjust its $4.26 billion indebtedness to the FCC and, as final Orders, they may be reviewed only by the Circuit Court; any relief granted by the Bankruptcy Court under 11 U.S.C. § 544 would necessarily conflict with the Restructuring Orders and thereby invade the purported jurisdiction of the FCC and the Circuit Court. It is argued that the adoption of the Restructuring Orders constituted an "intervening action" of the FCC which divested the Bankruptcy Court of jurisdiction which it might have had to administer those provisions of the Bankruptcy Code which would otherwise have applied to the FCC as a creditor.

The basic defect in the FCC's argument is that Congress did not confer upon the FCC the power to determine unilaterally its own rights as a creditor in competition with and to the detriment of other creditors. A fundamental objective of the Bankruptcy Code is to insure fairness and equality of treatment among creditors whose claims may vastly exceed the assets of the debtor, as in this case. Thus, the objective of fraudulent conveyance provisions is to insure that other creditors are not unfairly disadvantaged by the claim of a single creditor who, in a fraudulent or constructively fraudulent transaction, conveyed property to a debtor worth substantially less in value than the amount of its claim. Aside from fairness to other creditors, fraudulent conveyance and other provisions of the Bankruptcy Code are designed in part to facilitate the capacity of a debtor to reorganize and thereby repay its debts as they may be restructured in a

confirmable plan. Nothing in Section 309(j) or elsewhere in the FCA even suggests that Congress intended to empower the FCC to promulgate orders which have nothing to do with its regulatory functions and which are designed solely to enhance the FCC's position as a creditor to the detriment of rights provided under the Bankruptcy Code for the benefit of other creditors and the debtor.

That is not to say that the FCC did not have the right to promulgate the Restructuring Orders, as expressing the alternatives to which the FCC would voluntarily agree for the relief of C block licensees. Any party, whether government agency or private person, may formulate alternatives which it, as a creditor, would be willing to accept for the relief of its debtors. But in the absence of a clear expression by Congress, neither a Federal agency nor a private person has the power to dictate its own rights as a creditor and thereby confound the rights of other creditors and the debtor established by Congress under the bankruptcy laws. The FCA does not grant the FCC any such power and, as shown in NextWave's submissions, Congress declined to pass a bill propounded by the FCC which would have expressly voided the Bankruptcy Court's jurisdiction in cases such as this.

Little need be said of the FCC's argument that the FCA preempts a state fraudulent conveyance claim. First, the FCC does not and cannot take the position that the FCA preempts Section 544 of the Bankruptcy Code. Second, a state law claim may only be preempted by federal law under three circumstances: (i) where Congress defines explicitly the extent to which its enactments preempt state law or, in the absence of such

explicit statutory language, (ii) where state law "regulate[s] conduct in a field that Congress intended the Federal Government to occupy exclusively" or (iii) where state law "actually conflicts with federal law." *English* v. *General Electric Co.*, 496 U.S. 72, 78-79, 110 S. Ct. 2270, 110 L.Ed.2d 65 (1990). None of these circumstances exist in this case. Nothing in the FCA conflicts with a fraudulent conveyance claim or manifests an intent to legislate with respect to debtor-creditor relations or to authorize the FCC to dictate for itself a preferred creditor status at variance with state or Federal debtor-creditor laws or the Bankruptcy Code.

The second cause of action

The second cause of action of the First Amended Complaint is based exclusively on alleged misconduct of the FCC acting in its regulatory capacity. Thus, paragraph 92 alleges:

> 92. The FCC completely controlled all aspects of the C block auction process, including the rules, timing and manner in which the C block licenses were issued to NPCI. The C block licenses constitute all or substantially all of NPCI's assets. The FCC thus controlled NPCI's business and all of its assets.

Virtually every one of paragraphs 92 through 115, comprising the operative allegations of the second cause of action, allege conduct of the FCC in its regulatory capacity conferred under section 309(j), including such matters as the failure to inform NextWave that the FCC would commence and conclude bidding on the D, E and F blocks before NextWave received its license

determination made pursuant to . . . the [FAA] Act"); *City of Rochester v. Bond*, 603 F.2d 927, 936 (D.C. Cir. 1979) ("Congress [did not intend] the exclusivity vel non of statutory review to depend on the substantive infirmity alleged"). Subject matter jurisdiction depends on whether the claim asserted arises from conduct of the agency which relates to "the substantive core of an agency's mandate." *City of Rochester*, 603 F.2d at 937.

It follows from the foregoing that this Court does not have subject matter jurisdiction to adjudicate the propriety of the FCC's regulatory conduct complained of in the second cause of action.

* * * * * *

Counsel for NextWave and the FCC are directed to confer together and jointly prepare an order, agreed as to form, consistent with this decision, without prejudice to the right of either party to appeal.

CONDITIONS:

Pursuant to Section 309(h) of the Communications Act of 1934, as amended, (47 U.S.C. § 309(h)), this license is subject to the following conditions: This license does not vest in the licensee any right to operate a station nor any right in the use of frequencies beyond the term thereof nor in any other manner than authorized herein. Neither this license nor the right granted thereunder shall be assigned or otherwise transferred in violation of the Communications Act of 1934, as amended (47 U.S.C. § 151, et seq.). This license is subject in terms to the right of use or control conferred by Section 706 of the Communications Act of 1934, as amended (47 U.S.C. § 606).

WAIVERS:

No waivers associated with this authorization.

CONDITIONS:

This authorization is subject to the condition that, in the event that systems using the same frequencies as granted herein are authorized in an adjacent foreign territory (Canada/United States), future coordination of any base station transmitters within 72 km (45 miles) of the United States/Canada border shall be required to eliminate any harmful interference to operations in the adjacent foreign territory and to ensure continuance of equal access to the frequencies by both countries.

This authorization is conditioned upon the full and timely payment of all monies due pursuant to Sections 1.2110 and 24.711 of the Commission's Rules and the terms of the Commission's installment plan as set forth in the Note and Security Agreement executed by the licensee. Failure to comply with this condition will result in the automatic cancellation of this authorization.

Issued Date: January 3, 1997
FCC Form 463a

$14,539,220.72, due on the last day of the month and every ninety (90) days thereafter after April 30, 1997 through and including January 31, 2003.

Commencing with the payment due on April 30, 2003, Maker shall pay principal and interest in equal quarterly installments of **$63,954,958.51**, due on the last day of each month ninety (90) days hence through and including October 31, 2006.

The entire unpaid Principal Amount, together with accrued and unpaid interest thereon, and all remaining obligations of Maker hereunder, shall be due and payable on January 3, 2007 ("**Maturity Date**").

All interest shall be computed on the basis of a 360-day year for actual days elapsed.

All payments to be made hereunder, of principal, interest, costs, expenses, or other sums due hereunder, shall be made to the holder of this Note in lawful money of the United States of America which at the time of payment shall be legal tender for the payment of public and private debts, free and clear and without reduction by reason of any present or future income, stamp or other taxes, levies, imposts, deductions, charges, compulsory loans or withholdings whatsoever, including interest thereon or penalties with respect thereto, if any imposed, assessed, levied or collected by any political subdivision or taxing authority thereof or therein, on or in respect of this Note or the obligations it evidences. All payments shall be made during normal business hours at the Commission's designated lockbox location as set forth from time to time in the Commission's then-applicable orders and regulations and/or public notices.

the grant of such grace period or extension or upon denial of such a request for a grace period or extension, Maker has not resumed payments of Interest and Principal in accordance with the terms of this Note:

or;

b. failure by Maker to comply with any other condition for holding the above referenced License (as defined in the Security Agreement) as set forth in the License or in the Communications Act of 1934, as amended, or the then-applicable orders and regulations of the Commission; or

c. violation by Maker of any other covenant or term of this Note or the Security Agreement.

Upon any Event of Default under this Note, Payee may assess a late fee and/or administrative charge, plus the costs of collection, litigation, attorneys' fees, and default payment as specified in the then-applicable orders and regulations of the Commission, as amended, and Maker acknowledges that it is liable and herein expressly promises to pay on demand such additional costs, expenses, late charges, administrative charges, attorneys fees, and default payment. Upon a default under this Note, the unpaid Principal Amount, plus all unpaid interest accrued thereon, together with any late fee and/or administrative charge, plus the costs of collection, litigation, attorneys' fees, and default payment as specified in the then-applicable orders and regulations of the Commission, as amended, shall become immediately due and payable. The Maker hereby acknowledges that the Commission has issued Maker the above referenced License pursuant to the Communications

Act of 1934, as amended, that is conditioned upon full and timely payment of financial obligations under the Commission's installment payment plan, as set forth in the then-applicable orders and regulations of the Commission, as amended, and that the sanctions and enforcement authority of the Commission shall remain applicable in the event of a failure to comply with the terms and conditions of the License, regardless of the enforceability of this Note or the Security Agreement.

No delay or omission on the part of Payee in exercising any right under this Note, the Security Agreement, or any other instrument securing this Note, shall operate as a waiver of such right or of any other right of Payee, nor shall any waiver by Payee of any such right or rights on any one occasion be deemed a bar to or waiver of the same right or rights on any future occasion.

Maker is liable for all costs of collection or enforcement of the Payee's rights under this Note or under the Security Agreement or under any other instrument now or hereafter executed by Maker in favor of Payee which in any manner evidences or constitutes additional security for this Note, including reasonable attorneys' fees, whether suit is brought or not, and all such costs shall be paid by the Maker on demand, and whether or not such collection or enforcement occurs in any bankruptcy, reorganization, receivership or other proceedings involving creditors' rights or involving a claim under this Note or any of the other loan documents.

Maker, all endorsers and guarantors hereof and any other party who may become liable for all or any part of the obligation evidenced hereby, waive presentment for payment, notice or dishonor, protest and notice of

protest, notice of nonpayment and any and all lack of diligence or delays in collection or enforcement of this Note.

Maker may prepay all or any part of the Principal Amount without premium or penalty upon ten (10) days' prior written notice to Payee, given in the manner provided in the Security Agreement.

Partial prepayments shall not postpone or reduce regular payments to be made hereunder. All such prepayments shall be applicable first to the payment of late charges, if any, costs and expenses, and administrative penalties due hereunder, then to accrued and unpaid interest, then to that portion of the unpaid Principal Amount due on the Maturity Date and then, if applicable, to any unpaid installments of principal in the inverse order of installment maturities. The Payee may require that any partial prepayments be made on the dates installments of principal and interest are due hereunder.

Anything to the contrary notwithstanding, Payee shall not charge, take or receive, and Maker shall not be obligated to pay to Payee, any amounts constituting interest on the Principal Amount in excess of the maximum rate permitted by applicable law. If by reason of the acceleration of the unpaid Principal Amount or otherwise, interest in excess of the highest legal contract rate permitted by applicable law shall at any time be paid, any such excess shall constitute and be treated as a payment of outstanding principal hereunder and shall operate to reduce such outstanding Principal Amount.

ANY LEGAL ACTION OR PROCEEDING RELATING TO THIS NOTE, THE SECURITY AGREEMENT, OR OTHER DOCUMENTS EVIDENCING OR SECURING THE DEBT TRANSACTION EVIDENCED HEREBY MAY ONLY BE BROUGHT IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, AND, BY EXECUTION AND DELIVERY OF THIS NOTE AND SECURITY AGREEMENT, THE MAKER HEREBY ACCEPTS FOR ITSELF AND IN RESPECT OF ITS PROPERTY GENERALLY AND UNCONDITIONALLY, THE JURISDICTION OF THE AFORESAID COURT. THE PARTIES HERETO HEREBY IRREVOCABLY WAIVE ANY OBJECTION, INCLUDING, WITHOUT LIMITATION, ANY OBJECTION TO THE LAYING OF VENUE OR BASED ON THE GROUNDS OF *FORUM NON CONVENIENS*, WHICH ANY OF THEM MAY NOW OR HEREAFTER HAVE TO THE BRINGING OF ANY SUCH ACTION OR PROCEEDING IN THE DISTRICT OF COLUMBIA.

THE MAKER IRREVOCABLY CONSENTS TO THE SERVICE OF PROCESS OF THE AFOREMENTIONED COURT IN ANY SUCH ACTION OR PROCEEDING BY THE MAILING OF A COPY THEREOF BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, POSTAGE PREPAID, TO THE MAKER AT ITS ADDRESS PROVIDED HEREIN. SUCH SERVICE SHALL BE DEEMED TO HAVE OCCURRED ON THE THIRD DAY AFTER SUCH MAILING. NOTHING CONTAINED HEREIN SHALL AFFECT THE RIGHT OF PAYEE TO SERVE PROCESS IN ANY OTHER MANNER PERMITTED BY LAW OR COMMENCE LEGAL PROCEEDINGS OR OTHERWISE PROCEED AGAINST THE MAKER IN ANY OTHER JURISDICTION.

Maker acknowledges that this Note and Security Agreement (any attachments affixed thereto by the Commission with the permission and knowledge of the Maker/Debtor), along with the then-applicable Commission orders and regulations and the Communications Act of 1934, as amended, set forth the entire agreement, written and oral, of the parties, and all inconsistent prior statements, understandings, notices, representations and agreements between the parties, oral or written, are superseded by and merged in this Note, the Security Agreement or other documents evidencing or securing the debt transaction evidenced hereby. Except as otherwise expressly provided herein, all of Payee's representations, warranties, covenants and agreements in this Note and Security Agreement shall merge in the documents and agreements executed by the Maker and shall not survive said execution.

If any provision or part of this Note and/or the Security Agreement shall for any reason be held or deemed to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality or unenforecability shall not affect any other provision of this Note and this Note shall be construed as if such invalid, illegal or unenforceable provision had never been contained herein and the remaining provisions of this Note shall remain in full force and effect. The enforceability of the Note and/or the Security Agreement do not alter the rights and obligations of the Maker and Payee under the Communications Act of 1934, as amended, or under the then-applicable orders and regulations of the Commission, as amended.

Any notice demand or request hereunder shall be given in the manner set forth in the Security Agreement.

This Note shall be governed by and construed in accordance with the Communications Act of 1934, as amended, the then-applicable orders and regulations of the Commission, and federal law. Nothing in this Note shall be deemed to modify any then-applicable orders and regulations of the Commission, and nothing in this Note shall be deemed to release the Maker from compliance therewith. This Note may not be changed, modified, waived, terminated or discharged orally, but only by an agreement in writing executed by the party against whom enforcement of any such change, modification, waiver, termination, or discharge is sought.

Maker represents and warrants that any statements made by or on behalf of Maker in connection with this Note: (I) are true and accurate in all material respects; and (ii) do not omit any material facts or information that would make such statement misleading in the context of Payee's evaluation of the note, and acknowledges and agrees that Payee is entitled to and his relied on such statements in agreeing to the Note.

Payee shall have the right at any time to assign, endorse, pledge, convey or otherwise transfer this Note and all of the other loan documents to any party. From and after the date of such assignment, endorsement, pledge, conveyance or other transfer, such transferee shall be entitled to exercise any and all rights and remedies of Payee hereunder. Maker shall not assign, convey or otherwise transfer its rights and obligations hereunder without the prior written consent of the Commission.

License Number: PBB321C

INSTALLMENT PLAN C AMORTIZATION SCHEDULE

for Federal Communications Commission Broadband Personal Communications Service, C-Block Licenses

(Interest-only Payments for the First Six Years)

Orig Balance	Orig Rate	Term (yrs)	1st PMT	Future Value
$894,721,275.00	6.50%	10	Apr-97	$0

Pmt #	Date	Yr Rate	P&I Payment	Principal	Interest	Extra Prin	New Balance (Prin Only)	Cum. Interest	Yearly Total Int
1	Apr-97	6.50%	$19,082,533.83	$0.00	$19,082,533.83	$0.00	$894,721,275.00	$19,082,533.83	$19,082,533.83
2	Jul-97	6.50%	$14,539,220.72	$0.00	$14,539,220.72	$0.00	$894,721,275.00	$33,601,754.55	$14,539,220.72
3	Oct-97	6.50%	$14,539,220.72	$0.00	$14,539,220.72	$0.00	$894,721,275.00	$48,140,975.27	$29,078,441.44
4	Jan-98	6.50%	$14,539,220.72	$0.00	$14,539,220.72	$0.00	$894,721,275.00	$62,680,195.99	$43,617,662.16
5	Apr-98	6.50%	$14,539,220.72	$0.00	$14,539,220.72	$0.00	$894,721,275.00	$77,219,416.71	$58,156,882.88
6	Jul-98	6.50%	$14,539,220.72	$0.00	$14,539,220.72	$0.00	$894,721,275.00	$91,758,637.43	$14,539,220.72
7	Oct-98	6.50%	$14,539,220.72	$0.00	$14,539,220.72	$0.00	$894,721,275.00	$106,297,858.14	$29,078,441.44
8	Jan-99	6.50%	$14,539,220.72	$0.00	$14,539,220.72	$0.00	$894,721,275.00	$120,837,078.86	$43,617,662.16
9	Apr-99	6.50%	$14,539,220.72	$0.00	$14,539,220.72	$0.00	$894,721,275.00	$135,376,299.58	$58,156,882.88
10	Jul-99	6.50%	$14,539,220.72	$0.00	$14,539,220.72	$0.00	$894,721,275.00	$149,915,520.30	$14,539,220.72
11	Oct-99	6.50%	$14,539,220.72	$0.00	$14,539,220.72	$0.00	$894,721,275.00	$164,454,741.02	$29,078,441.44
12	Jan-2000	6.50%	$14,539,220.72	$0.00	$14,539,220.72	$0.00	$894,721,275.00	$178,993,961.74	$43,617,662.16
13	Apr-2000	6.50%	$14,539,220.72	$0.00	$14,539,220.72	$0.00	$894,721,275.00	$193,533,182.46	$58,156,882.88
14	Jul-2000	6.50%	$14,539,220.72	$0.00	$14,539,220.72	$0.00	$894,721,275.00	$208,072,403.18	$14,539,220.72
15	Oct-2000	6.50%	$14,539,220.72	$0.00	$14,539,220.72	$0.00	$894,721,275.00	$222,611,623.89	$29,078,441.44
16	Jan-2001	6.50%	$14,539,220.72	$0.00	$14,539,220.72	$0.00	$894,721,275.00	$237,150,844.61	$43,617,662.16
17	Apr-2001	6.50%	$14,539,220.72	$0.00	$14,539,220.72	$0.00	$894,721,275.00	$251,690,065.33	$58,156,882.88
18	Jul-2001	6.50%	$14,539,220.72	$0.00	$14,539,220.72	$0.00	$894,721,275.00	$266,229,286.05	$14,539,220.72
19	Oct-2001	6.50%	$14,539,220.72	$0.00	$14,539,220.72	$0.00	$894,721,275.00	$280,768,506.77	$29,078,441.44
20	Jan-2002	6.50%	$14,539,220.72	$0.00	$14,539,220.72	$0.00	$894,721,275.00	$295,307,727.49	$43,617,662.16
21	Apr-2002	6.50%	$14,539,220.72	$0.00	$14,539,220.72	$0.00	$894,721,275.00	$309,846,948.21	$58,156,882.88
22	Jul-2002	6.50%	$14,539,220.72	$0.00	$14,539,220.72	$0.00	$894,721,275.00	$324,386,168.93	$14,539,220.72
23	Oct-2002	6.50%	$14,539,220.72	$0.00	$14,539,220.72	$0.00	$894,721,275.00	$338,925,389.64	$29,078,441.44
24	Jan-2003	6.50%	$14,539,220.72	$0.00	$14,539,220.72	$0.00	$894,721,275.00	$353,464,610.36	$43,617,662.16
25	Apr-2003	6.50%	$63,954,958.51	$49,415,737.79	$14,539,220.72	$0.00	$845,305,537.21	$368,003,831.08	$58,156,882.88
26	Jul-2003	6.50%	$63,954,958.51	$50,218,743.53	$13,736,214.98	$0.00	$795,086,793.68	$381,740,046.06	$13,736,214.98
27	Oct-2003	6.50%	$63,954,958.51	$51,034,788.11	$12,920,160.40	$0.00	$744,051,995.57	$394,660,206.46	$26,656,375.38
28	Jan-2004	6.50%	$63,954,958.51	$51,864,113.58	$12,090,844.93	$0.00	$692,187,881.99	$406,751,051.39	$38,747,220.31
29	Apr-2004	6.50%	$63,954,958.51	$52,708,905.43	$11,246,053.08	$0.00	$639,480,976.56	$417,998,104.47	$49,995,273.39
30	Jul-2004	6.50%	$63,954,958.51	$53,583,392.64	$10,391,565.87	$0.00	$585,917,583.92	$428,389,670.34	$10,391,565.87
31	Oct-2004	6.50%	$63,954,958.51	$54,433,797.77	$9,521,160.74	$0.00	$531,483,786.15	$437,911,831.08	$19,912,726.61
32	Jan-2005	6.50%	$63,954,958.51	$55,318,346.99	$8,636,611.52	$0.00	$476,165,439.16	$446,548,442.60	$28,549,338.13
33	Apr-2005	6.50%	$63,954,958.51	$56,217,270.12	$7,737,688.39	$0.00	$419,948,169.04	$454,286,130.99	$36,287,026.52
34	Jul-2005	6.50%	$63,954,958.51	$57,130,800.76	$6,824,157.75	$0.00	$362,817,368.28	$461,110,288.74	$6,824,157.75
35	Oct-2005	6.50%	$63,954,958.51	$58,058,176.28	$5,895,782.23	$0.00	$304,758,192.00	$467,006,070.97	$12,719,939.98
36	Jan-2006	6.50%	$63,954,958.51	$59,002,637.89	$4,952,320.62	$0.00	$245,755,554.11	$471,958,391.59	$17,672,260.60
37	Apr-2006	6.50%	$63,954,958.51	$59,961,430.76	$3,993,527.75	$0.00	$185,794,123.35	$475,951,919.34	$3,993,527.75
38	Jul-2006	6.50%	$63,954,958.51	$60,935,804.01	$3,019,154.50	$0.00	$124,858,319.34	$478,971,073.84	$7,012,682.25
39	Oct-2006	6.50%	$63,954,958.51	$61,926,010.82	$2,028,947.69	$0.00	$62,932,308.52	$481,000,021.53	$9,041,629.94
40	Jan-2007	6.50%	$63,648,183.53	$62,932,308.52	$715,855.01	$0.00	$0.00	$481,715,876.54	$715,855.01

License Grant date January 3, 1997
First and last payments prorated based on the above license grant date

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APPENDIX O

SECURITY AGREEMENT

(Broadband Personal Communications Service,
C Block: Auction Event No. 5, 10)

License No. PBB321C

This SECURITY AGREEMENT DATED January 3, 1997, ("**Agreement**") between NEXTWAVE PERSONAL COMMUNICATIONS, INC., a Delaware corporation ("**Debtor**"), and the FEDERAL COMMUNICATIONS COMMISSION, an independent regulatory agency of the United States ("**Commission**" or "**Secured Party**")

WITNESSETH

WHEREAS, Debtor has submitted the highest accepted bid for license number PBB321C in the Broadband Personal Communications Service C Block auction (hereinafter the "**License**") conducted by the Commission to assign such licenses;

WHEREAS, the Commission has duly determined to grant the License to Debtor, subject to the terms and conditions set forth in the orders and regulations of the Commission applicable to such licenses, and the Communications Act of 1934, as amended;

WHEREAS, Debtor wishes to pay its auction price for the License by installments through an Installment Payment Plan as provided by 47 C.F.R. §§ 24.711, 1.2110 (hereinafter the "**Installment Payment Plan**") and undertakes to hold the License under the terms

and conditions set forth in the Commission's orders and regulations, as amended, applicable to such licenses, and the Communications Act of 1934, as amended and the terms and conditions of this Agreement;

WHEREAS, the Commission has agreed to permit the Debtor to make payment of the auction price for the License through an Installment Payment Plan; and

WHEREAS, as a condition to such agreement, Debtor has agreed to execute the Installment Payment Plan Note of even date ("**Note**") and to enter into this Agreement and make the pledge and assignment of collateral contemplated herein.

NOW, THEREFORE, in consideration of the premises, the mutual agreements contained herein and for other good and valuable consideration, the receipt, adequacy, and sufficiency of which is hereby acknowledged, and in order to induce the Commission to permit Debtor to pay the auction price for the License through the Installment Payment Plan, Debtor hereby agrees with the Commission as follows:

1. Pledge and Assignment of Collateral for Obligations Under Note. Debtor hereby pledges, assigns, hypothecates, delivers, and sets over to the Commission and grants to the Commission a fist lien on and continuing security interest in all of the Debtor's rights and interest in the License and all proceeds, profits and products of any sale of or other disposition thereof (collectively the "**Collateral**"), all as collateral security for the prompt and complete payment when due (whether in accordance with the schedule of payments, at the stated maturity, by acceleration, or otherwise) of the unpaid principal and interest due, and such other

additional costs, expenses, late charges, administrative charges, attorneys fees, and default payments assessable under the terms of the Note (all collectively "**Obligations**"). It is expressly understood by Debtor that all of the terms of the Note apply to this Agreement and that reference herein to "this Agreement" includes both the Security Agreement herein and the Note. For purposes of interpreting the terms used in this Agreement shall have the meaning ascribed to them in the Uniform Commercial Code (Official Text and Comments, American Law Institute).

2. Interest of Commission. It is understood and acknowledged by Debtor that pursuant to Section 301 of the Communications Act of 1934, as amended, the Commission is charged with the regulatory mandate to maintain control over all channels of radio transmission (the "Spectrum"), and to provide licenses for the use of such radio channels, but not ownership thereof. Debtor understands and acknowledges that it holds a mere conditional license to use the Spectrum with no ownership interest in the Collateral (or any underlying right to use the Spectrum), or any power to assign the License without the prior approval of the Commission pursuant to Section 310(d) of the Communications Act of 1934, as amended. Debtor further understands and acknowledges that it is giving a security interest to the Commission in the Collateral only to assist the Commission in protecting its ability to enforce the Commission's regulations which condition holding the license in compliance with all then-applicable orders and regulations of the Commission, including, but not limited to, full and timely payment of all payments under the Installment Payment Plan. To that end, and not in derogation of any of the Commission's regulatory

authority over the License, Debtor hereby acknowledges that the Commission has a first security interest in the Collateral, and Debtor shall not dispute such first security interest, or the Commission's rights as a secured party hereunder, in any legal or equitable proceeding in which Debtor, or any assignee or trustee of the estate of Debtor in bankruptcy, is a party. Nothing set forth herein shall preclude the Debtor from granting to other parties a subordinated security interest limited to a subordinated interest in the proceeds arising from an authorized assignment or transfer of the License to a third party (hereinafter a "Subordinated Security Interest"), provided however that any such Subordinated Security Interest shall be subordinated to and in no way inconsistent with the Commission's first security interest in the Collateral, including but not limited to the proceeds of any disposition of the License, and further provided that said Subordinated Security Interest shall not survive if the License is rescinded, cancelled, or revoked by regulatory action of the Commission for violation of the terms and conditions of the License, including but not limited to regulatory action upon a default under this Agreement pursuant to 47 C.F.R. § 1.2110. The Debtor shall provide to the Commission upon request the name and address of any party with a Subordinated Security Interest in the proceeds of any disposition of the License, and a copy of any documents setting forth such a Subordinated Security Interest.

3. Compliance with Commission Orders and Regulations. Nothing in this Agreement shall be deemed to modify any then-applicable orders and regulations of the Commission, and nothing in this Agreement shall be deemed to release Debtor from compliance therewith.

4. Representations and Warranties of Debtor. Debtor represents and warrants to the Commission as follows:

(a) It has full power, authority and legal right to execute, deliver and perform this Agreement, the Note, and any other documents delivered in connection with the Note, this Agreement and the transactions contemplated therein, to make the debt transaction evidenced by the Note, and to pledge the Collateral pursuant to this Agreement.

(b) It is a duly organized corporation, existing in good standing under the laws of Delaware and is duly qualified to do business wherever necessary to carry on its present operations. Its principal place of business and chief executive office are located at San Diego, CA, 92122.

(c) The representative of Debtor purporting to act on behalf of Debtor in executing this Agreement, the Note, and any other documents delivered in connection with the Note, this Agreement and the transactions contemplated therein, is duly authorized by Debtor to take all such acts and to execute all such documents.

(d) No security agreements have been executed and delivered, and no financing statements have been filed in any jurisdiction, granting or purporting to grant a security interest in the Collateral that would give any other person any right or interest in the Collateral, or any portion thereof, except for a Subordinated Security Interest, as defined herein, and that no person has a secured interest that is or will be in any way inconsistent with the rights of the

Commission herein as the first secured party or the terms of this Agreement.

(e) No consent of any other party and no consent, license, approval or authorization of, exemption by, or registration or declaration with, any governmental instrumentality, domestic or foreign other than the Commission, is required to be obtained in connection with the execution, delivery or performance of this Agreement, the Note or any other document executed and delivered in connection with the delivery of the Note or this Agreement.

(f) The execution, delivery and performance of this Agreement and the Note does not and will not violate any provision of any applicable law or regulation or any order, judgment, writ, award or decree of any court, arbitrator, governmental instrumentality, domestic or foreign, or of any indenture, contract, agreement or other undertaking to which Debtor is a party or which purports to be binding upon Debtor or upon any of Debtor's assets, and will not result in the creation or imposition of any lien, charge or encumbrance on or security interest in any of the assets of Debtor, except as contemplated by this Agreement.

(g) Debtor will not permit any financing statement to be filed with respect to the Collateral or any portion thereof or interest therein that would give said any other person a right or any interest in the Collateral, or any portion thereof, except that Debtor may permit a third party to file a Subordinated Security Interest, as defined herein, so long as said Subordinated Security Interest, is

not in any way inconsistent with the terms of this Agreement and the rights of the Commission herein as the first secured party. Debtor will promptly notify Secured Party of, and will defend the Collateral against, all claims and demands of all persons at any time claiming the same or any interest therein that would give any other person a right or any interest in the Collateral not subordinated to the rights of the Commission herein as the first secured party, or that is in any way inconsistent with the terms of this Agreement.

5. Covenants of Debtor. Debtor hereby covenants and agrees as follows:

(a) That it will defend the Commission's right, title and security interest in and to the Collateral against the claims and demands of all persons whomsoever.

(b) That it will execute all financing statements and other instruments or documents related to the perfection of the Commission's security interest, including but not limited to any renewal financing statements or instruments as required to maintain the Commission's security interest, or as otherwise reasonably requested by the Commission, and to file and pay the cost of filing any such instruments or documents as required under this paragraph in whichever public office deemed advisable by the Commission.

(c) That it will not make any indenture, contract, agreement or other undertaking to which Debtor is a party or which purports to be binding upon Debtor, or upon any of Debtor's assets, that would

result in the creation or imposition of any lien, charge or encumbrance on or security interest in any of the assets Debtor that would give any other person a right or any interest in the Collateral, or any portion thereof, except for a Subordinated Security Interest, as defined herein, provided that such Subordinated Security Agreement is not inconsistent with the terms of this Agreement and interest of the Commission as the first secured party.

(d) That it will pay all costs and expenses, including reasonable attorneys' fees, of the Commission incurred in connection with the enforcement of this Agreement and any and all liability incurred by the Commission resulting from any act or omission of Debtor with respect to the Collateral and this Agreement.

(e) Debtor will execute, alone or with Secured Party, any document, will procure any document and do all other acts and pay all connected costs, in a timely and proper manner, which from the character or use of the Collateral may be reasonably necessary to protect the Collateral against the rights, claims or interests of third persons, and will otherwise preserve the Collateral as security hereunder. The specific undertakings required of Debtor in this Agreement shall not be construed to exclude the aforementioned general obligation.

6. Power of Attorney. Debtor hereby irrevocably constitutes and appoints the Commission and any officer or agent thereof, with full power of substitution, as its true and lawful attorney-in-fact will irrevocable power and authority in the place and stead of Debtor

and in the name of Debtor or in its own name, from time to time in the Commission's discretion, for the purpose of carrying out the terms of this Agreement and, to the extent permitted by applicable law, to take any and all appropriate actions and to execute any and all documents and instruments which may be necessary or desirable to accomplish the purposes of this Agreement. Such appointment is a power coupled with an interest until all Obligations have been paid in full by Debtor.

7. Event of Default. Debtor shall be in default under this Agreement if an Event of Default (as defined in the Note) has occurred.

8. Remedies. If an Event of Default shall occur, the Commission shall thereafter have the following rights and remedies (to the extent permitted by applicable law) in addition to the rights and remedies relating to the Note, all such remedies being cumulative, not exclusive, and enforceable alternatively, successively or concurrently at such time or times as Commission deems expedient:

(a) the License shall be automatically canceled pursuant to 47 C.F.R. § 1.2110;

(b) all Obligations secured hereunder shall become immediately due and payable without presentment, demand, protest, further notice, or other requirements of any kind;

(c) the Commission may demand, sue for, and collect the outstanding balance of the unpaid Obligations, and make any compromise, or settlement the Commission deems suitable with respect to any Collateral which may be held by it hereunder;

(d) Debtor hereby acknowledges the Commission's authority, pursuant to the Communications Act of 1934, as amended, and the Commission's orders and regulations then-applicable to such licenses, to conduct another public auction or assign the License in the event that the Commission rescinds, cancels, or revokes the License for any default under this Agreement or any other violation of the terms and conditions of the License. The Undersigned hereby waives all notices prior to the conduct of said public auction or assignment by the Commission or its agents. Debtor further acknowledges that in the event that the Commission rescinds, cancels, or revokes the License for any default under this Agreement or any other violation of the terms and conditions of the License, Debtor has no right or interest in any moneys or evidence of indebtedness given to the Commission by a subsequent licensee of the Spectrum and that all such moneys or evidence of indebtedness are, and shall remain, the full property of the federal Treasury, pursuant to Section 309(j) of the Communications Act of 1934, as amended, and then-applicable Commission orders and regulations.

(e) In addition to other remedies hereunder, Debtor shall remain liable, and obligated to pay on demand, all costs of collection and reasonable attorneys' fees and expenses incurred or paid by the Commission in enforcing this Agreement including, without limitation, all administrative fees and expenses of the Commission in attempting to collect the Obligations or to enforce this Agreement, or the prosecution or defense of any action or proceeding related to the subject matter of this Agreement, and

all payments assessed by the Commission in the event of default as specified in Commission orders and regulations applicable to such licenses.

(f) Debtor hereby acknowledges that the Commission has no adequate remedy at law with respect to a breach of any covenant contained in this Agreement and, as a consequence, agrees that each and every covenant contained in this Agreement shall be specifically enforceable against Debtor, and Debtor hereby waives and agrees not to assert any defense against an action for specific performance of such covenants.

(g) Secured Party may exercise any and all of the rights and remedies conferred upon Secured Party by this Agreement, any other loan documents, or by applicable law, either concurrently or in such order as Secured Party may determine.

(h) Secured Party may make such payments and do such acts as Secured Party may deem necessary to protect its security interest in the Collateral.

(i) the Commission may exercise any remedies of a Secured Party under the Uniform Commercial Code (Official Text and Comments, American Law Institute), or any other applicable law.

(j) Secured Party shall have the right to enforce one or more remedies hereunder or under the Note, successively or concurrently, and such action shall not operate to estop or prevent Secured Party from pursuing any further remedy which it may have.

9. Severability. Any provision of this Agreement that is prohibited or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability without invalidating the remaining provisions hereof, and any such prohibition or unenforceability in any jurisdiction shall not invalidate or render unenforceable such provision in any other jurisdiction.

10. No Waiver; Cumulative Remedies. None of the terms or provisions of this Agreement may be waived, altered, modified or amended except by an instrument in writing, duly executed by the Commission. The Commission shall not by any act, delay, omission or otherwise be deemed to have waived any of its rights or remedies under this Agreement, and no waiver shall be valid unless in writing, signed by the Commission, and then only to the extent therein set forth. A waiver by the Commission of any right or remedy under this Agreement on any one occasion shall not be construed as a bar to any right or remedy which the Commission would otherwise have on any future occasion. No failure to exercise nor any delay in exercising on the part of the Commission, any right, power or privilege under this Agreement shall operate as a waiver thereof; nor shall any single or partial exercise of any right, power or privilege under this Agreement preclude any other or further exercise thereof or the exercise of any other right, power or privilege. The rights and remedies provided in this Agreement are cumulative and may be exercised singly or concurrently and are not exclusive of any rights or remedies provided by law.

11. Compliance With Other Applicable Orders and Regulations. Debtor recognizes that its continued retention of the License, and rights to operate as a Commission licensee thereunder, are conditioned upon compliance with all Commission orders and regulations applicable to the License and the Communications Act of 1934, as amended. Debtor further recognizes that full and timely payment as set forth in the Note does not otherwise relieve it of its obligations otherwise to comply with the then-applicable orders and regulations of the Commission, and the Communications Act of 1934, as amended.

12. Applicable Law. This Agreement shall be governed by and construed in accordance with Communications Act of 1934, as amended, then-applicable Commission orders and regulations, as amended, and federal law.

13. Successors, Assigns, Designated Agents. Subject to the provisions of Section 2 of this Agreement regarding the restriction upon Debtor's ability to assign the License, this Agreement shall be binding upon Debtor, its successors and assigns and shall inure to the benefit of the Commission, and its successors and assigns. The Commission may designate agents other than the Commission to act on its behalf with respect to any and all rights and remedies of the Commission under this Agreement or the Note, and such designee shall have all of the rights, powers and remedies available to the Commission within the scope of its designation. Nothing herein, however, shall be construed as granting Debtor any right to sell or assign the License.

14. Singular and Plural. Wherever used, the singular number shall include the plural, the plural shall include the singular, and the use of any gender shall be applicable to all genders.

15. Financing Statements. To the extent permitted by applicable law, Debtor authorizes the Commission to sign and file financing statements at any time with respect to any of the Collateral without the signature of Debtor. Debtor will, however, at the same time and from time to time, execute such financing statements, agreements and other instruments and perform such acts as Commission may request in order to establish and maintain a validly perfected first priority security interest in the Collateral. All reasonable costs of filing and recording will be paid by Debtor.

16. Indemnification. Debtor hereby agrees to defend, indemnify and hold harmless Secured Party and its employees, officers and agents, from and against any and all liabilities, claims and obligations which may be incurred, asserted or imposed upon them or any of them as a result of or in connection with any use, operation, lease or consumption of any of the Collateral or as a result of Secured Party's seeking to obtain performance of any of the obligations due with respect to the Collateral.

17. Notices. All notices, requests and demands hereunder shall be in writing and shall be deemed to have been duly given, made or served on the earliest of (I) three (3) business days after the date mailed if sent by first-class U.S. mail, postage prepaid, (ii) actual delivery thereof if delivered by hand to the party to be notified, (iii) receipt thereof if sent by express mail or

other overnight courier service, or (iv) transmission to the telecopier number listed below for the party to be notified if sent within normal business hours or, otherwise, on the next business day thereafter. In each case such notification with respect to the Debtor and the Commission shall be addressed as set forth below or as may be hereafter designed by the respective parties hereto.

As to Debtor:

General Counsel
NextWave Personal
Communications Inc.
6256 Greenwich Drive
Suite 500
San Diego, CA 92122

Copy to:

Office of Regulatory Affairs
NextWavePersonal
Communications Inc.
101 Pennsylvania Ave., NW
Suite 805
Washington, D.C. 20004

As to the Commission:

U.S. DEPARTMENT OF TREASURY
P.O. BOX 44093
WASHINGTON, D.C. 20025-4093 [20026-4093]
ATTN: FCC FMS/DEBT MANAGEMENT SERVICE

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed and delivered as of the day and year first above written.

DEBTOR: NEXTWAVE PERSONAL COMMUNICATIONS, INC.

Date: 2/19/97 By: ALLEN SALMASI

Its: CEO, President, and Chairman of the Board

FEDERAL COMMUNICATIONS COMMISSION

Date: 3/6/97 By: Marilyn J. McDermott

Its: Associate Managing Director for Operations (or Designee)

APPENDIX P

1. 11 U.S.C. 362 (2000) provides:

§ 362 Automatic stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of—

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay—

(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;

(2) under subsection (a) of this section—

(A) of the commencement or continuation of an action or proceeding for—

(i) the establishment of paternity; or

(ii) the establishment or modification of an order for alimony, maintenance, or support; or

(B) of the collection of alimony, maintenance, or support from property that is not property of the estate;

(3) under subsection (a) of this section, of any act to perfect, or to maintain or continue the perfection

of, an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title;

(4) under paragraph (1), (2), (3), or (6) of subsection (a) of this section, of the commencement or continuation of an action or proceeding by a governmental unit or any organization exercising authority under the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, opened for signature on January 13, 1993, to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power;

[(5) Repealed. Pub. L. 105-277, div. I, title VI, § 603(1), Oct. 21, 1998, 112 Stat. 2681-886;]

(6) under subsection (a) of this section, of the setoff by a commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency of any mutual debt and claim under or in connection with commodity contracts, as defined in section 761 of this title, forward contracts, or securities contracts, as defined in section 741 of this title, that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title,

arising out of commodity contracts, forward contracts, or securities contracts against cash, securities, or other property held by or due from such commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency to margin, guarantee, secure, or settle commodity contracts, forward contracts, or securities contracts;

(7) under subsection (a) of this section, of the setoff by a repo participant, of any mutual debt and claim under or in connection with repurchase agreements that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 741 or 761 of this title, or settlement payment, as defined in section 741 of this title, arising out of repurchase agreements against cash, securities, or other property held by or due from such repo participant to margin, guarantee, secure or settle repurchase agreements;

(8) under subsection (a) of this section, of the commencement of any action by the Secretary of Housing and Urban Development to foreclose a mortgage or deed of trust in any case in which the mortgage or deed of trust held by the Secretary is insured or was formerly insured under the National Housing Act and covers property, or combinations of property, consisting of five or more living units;

(9) under subsection (a), of—

(A) an audit by a governmental unit to determine tax liability;

(B) the issuance to the debtor by a governmental unit of a notice of tax deficiency;

(C) a demand for tax returns; or

(D) the making of an assessment for any tax and issuance of a notice and demand for payment of such an assessment (but any tax lien that would otherwise attach to property of the estate by reason of such an assessment shall not take effect unless such tax is a debt of the debtor that will not be discharged in the case and such property or its proceeds are transferred out of the estate to, or otherwise revested in, the debtor).

(10) under subsection (a) of this section, of any act by a lessor to the debtor under a lease of nonresidential real property that has terminated by the expiration of the stated term of the lease before the commencement of or during a case under this title to obtain possession of such property;

(11) under subsection (a) of this section, of the presentment of a negotiable instrument and the giving of notice of and protesting dishonor of such an instrument;

(12) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Transportation under section 31325 of title 46

(including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage, or a security interest in or relating to a vessel or vessel under construction, held by the Secretary of Transportation under section 207 or title XI of the Merchant Marine Act, 1936, or under applicable State law;

(13) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Commerce under section 31325 of title 46 (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage in a vessel or a mortgage, deed of trust, or other security interest in a fishing facility held by the Secretary of Commerce under section 207 or title XI of the Merchant Marine Act, 1936;

(14) under subsection (a) of this section, of any action by an accrediting agency regarding the accreditation status of the debtor as an educational institution;

(15) under subsection (a) of this section, of any action by a State licensing body regarding the licensure of the debtor as an educational institution;

(16) under subsection (a) of this section, of any action by a guaranty agency, as defined in section 435(j) of the Higher Education Act of 1965 or the

Secretary of Education regarding the eligibility of the debtor to participate in programs authorized under such Act;

(17) under subsection (a) of this section, of the setoff by a swap participant, of any mutual debt and claim under or in connection with any swap agreement that constitutes the setoff of a claim against the debtor for any payment due from the debtor under or in connection with any swap agreement against any payment due to the debtor from the swap participant under or in connection with any swap agreement or against cash, securities, or other property of the debtor held by or due from such swap participant to guarantee, secure or settle any swap agreement; or

(18) under subsection (a) of the creation or perfection of a statutory lien for an ad valorem property tax imposed by the District of Columbia, or a political subdivision of a State, if such tax comes due after the filing of the petition.

The provisions of paragraphs (12) and (13) of this subsection shall apply with respect to any such petition filed on or before December 31, 1989.

(c) Except as provided in subsections (d), (e), and (f) of this section—

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate; and

(2) the stay of any other act under subsection (a) of this section continues until the earliest of—

(A) the time the case is closed;

(B) the time the case is dismissed; or

(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, or 13 of this title, the time a discharge is granted or denied.

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

(2) with respect to a stay of an act against property under subsection (a) of this section, if—

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization; or

(3) with respect to a stay of an act against single asset real estate under subsection (a), by a creditor whose claim is secured by an interest in such real estate, unless, not later than the date that is 90 days after the entry of the order for relief (or such later date as the court may

determine for cause by order entered within that 90-day period)—

(A) the debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time; or

(B) the debtor has commenced monthly payments to each creditor whose claim is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien), which payments are in an amount equal to interest at a current fair market rate on the value of the creditor's interest in the real estate.

(e) Thirty days after a request under subsection (d) of this section for relief from the stay of any act against property of the estate under subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending the conclusion of, or as a result of, a final hearing and determination under subsection (d) of this section. A hearing under this subsection may be a preliminary hearing, or may be consolidated with the final hearing under subsection (d) of this section. The court shall order such stay continued in effect pending the conclusion of the final hearing under subsection (d) of this section if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the conclusion of such final hearing. If the hearing under this subsection is a preliminary hearing, then such final hearing shall be concluded not later than thirty days after the conclusion of such preliminary hearing, unless the 30-

day period is extended with the consent of the parties in interest or for a specific time which the court finds is required by compelling circumstances.

(f) Upon request of a party in interest, the court, with or without a hearing, shall grant such relief from the stay provided under subsection (a) of this section as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an opportunity for notice and a hearing under subsection (d) or (e) of this section.

(g) In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section—

(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and

(2) the party opposing such relief has the burden of proof on all other issues.

(h) An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

2. 11 U.S.C. 525 provides:

§ 525. Protection against discriminatory treatment

(a) Except as provided in the Perishable Agricultural Commodities Act, 1930, the Packers and Stockyards Act, 1921, and section 1 of the Act entitled "An Act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1944, and for other purposes," approved July 12, 1943, a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act, or another person with whom such bankrupt or debtor has been associated, solely because such bankrupt or debtor is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act.

(b) No private employer may terminate the employment of, or discriminate with respect to employment against, an individual who is or has been a debtor under this title, a debtor or bankrupt under the Bankruptcy Act, or an individual associated with such debtor or bankrupt, solely because such debtor or bankrupt—

(1) is or has been a debtor under this title or a debtor or bankrupt under the Bankruptcy Act;

(2) has been insolvent before the commencement of a case under this title or during the case but before the grant or denial of a discharge; or

(3) has not paid a debt that is dischargeable in a case under this title or that was discharged under the Bankruptcy Act.

(c)(1) A governmental unit that operates a student grant or loan program and a person engaged in a business that includes the making of loans guaranteed or insured under a student loan program may not deny a grant, loan, loan guarantee, or loan insurance to a person that is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, or another person with whom the debtor or bankrupt has been associated, because the debtor or bankrupt is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of a case under this title or during the pendency of the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act.

(2) In this section, "student loan program" means the program operated under part B, D, or E of title IV of the Higher Education Act of 1965 or a similar program operated under State or local law.

3. 28 U.S.C. 1334 (2000)

§ 1334. Bankruptcy cases and proceedings

(a) Except as provided in subsection (b) of this section, the district court shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district court shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c)(1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

(d) Any decision to abstain or not to abstain made under this subsection (other than a decision not to

abstain in a proceeding described in subsection (c)(2)) is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title. This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.

4. 47 U.S.C. 309(j) (1994) provides:

§ 309. Application for license

* * * * *

(j) Use of competitive bidding

(1) General authority

If mutually exclusive applications are accepted for filing for any initial license or construction permit which will involve a use of the electromagnetic spectrum described in paragraph (2), the Commission shall have the authority, subject to paragraph (10), to grant such license or permit to a qualified applicant through the use of a system of competitive bidding that meets the requirements of this subsection.

(2) Uses to which bidding may apply

A use of the electromagnetic spectrum is described in this paragraph if the Commission determines that—

(A) the principal use of such spectrum will involve, or is reasonably likely to involve, the licensee receiving compensation from subscribers in return for which the licensee—

(i) enables those subscribers to receive communications signals that are transmitted utilizing frequencies on which the licensee is licensed to operate; or

(ii) enables those subscribers to transmit directly communications signals utilizing frequencies on which the licensee is licensed to operate; and

(B) a system of competitive bidding will promote the objectives described in paragraph (3).

(3) Design of systems of competitive bidding

For each class of licenses or permits that the Commission grants through the use of a competitive bidding system, the Commission shall, by regulation, establish a competitive bidding methodology. The Commission shall seek to design and test multiple alternative methodologies under appropriate circumstances. In identifying classes of licenses and permits to be issued by competitive bidding, in specifying eligibility and other characteristics of such licenses and permits, and in designing the methodologies for use under this subsection, the Commission shall include safeguards to protect the public interest in the use of the spectrum and shall seek to promote the purposes specified in section 151 of this title and the following objectives:

(A) the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays;

(B) promoting economic opportunity and competition and ensuring that new and innova-

tive technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women;

(C) recovery for the public of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource; and

(D) efficient and intensive use of the electromagnetic spectrum.

(4) Contents of regulations

In prescribing regulations pursuant to paragraph (3), the Commission shall—

(A) consider alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments, with or without royalty payments, or other schedules or methods that promote the objectives described in paragraph (3)(B), and combinations of such schedules and methods;

(B) include performance requirements, such as appropriate deadlines and penalties for performance failures, to ensure prompt delivery of service to rural areas, to prevent stockpiling or warehousing of spectrum by licensees or permittees, and to promote investment in

and rapid deployment of new technologies and services;

(C) consistent with the public interest, convenience, and necessity, the purposes of this chapter, and the characteristics of the proposed service, prescribe area designations and bandwidth assignments that promote (i) an equitable distribution of licenses and services among geographic areas, (ii) economic opportunity for a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women, and (iii) investment in and rapid deployment of new technologies and services;

(D) ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services, and, for such purposes, consider the use of tax certificates, bidding preferences, and other procedures; and

(E) require such transfer disclosures and antitrafficking restrictions and payment schedules as may be necessary to prevent unjust enrichment as a result of the methods employed to issue licenses and permits.

(5) Bidder and licensee qualification

No person shall be permitted to participate in a system of competitive bidding pursuant to this

subsection unless such bidder submits such information and assurances as the Commission may require to demonstrate that such bidder's application is acceptable for filing. No license shall be granted to an applicant selected pursuant to this subsection unless the Commission determines that the applicant is qualified pursuant to subsection (a) of this section and sections 308(b) and 310 of this title. Consistent with the objectives described in paragraph (3), the Commission shall, by regulation, prescribe expedited procedures consistent with the procedures authorized by subsection (i)(2) of this section for the resolution of any substantial and material issues of fact concerning qualifications.

(6) Rules of construction

Nothing in this subsection, or in the use of competitive bidding, shall—

(A) alter spectrum allocation criteria and procedures established by the other provisions of this chapter;

(B) limit or otherwise affect the requirements of subsection (h) of this section, section 301, 304, 307, 310, or 606 of this title, or any other provision of this chapter (other than subsections (d)(2) and (e) of this section);

(C) diminish the authority of the Commission under the other provisions of this chapter to regulate or reclaim spectrum licenses;

(D) be construed to convey any rights, including any expectation of renewal of a license, that differ from the rights that apply to other licenses within the same service that were not issued pursuant to this subsection;

(E) be construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings;

(F) be construed to prohibit the Commission from issuing nationwide, regional, or local licenses or permits;

(G) be construed to prevent the Commission from awarding licenses to those persons who make significant contributions to the development of a new telecommunications service or technology; or

(H) be construed to relieve any applicant for a license or permit of the obligation to pay charges imposed pursuant to section 158 of this title.

(7) Consideration of revenues in public interest determinations

(A) Consideration prohibited

In making a decision pursuant to section 303(c) of this title to assign a band of frequencies to a use for which licenses or permits will

be issued pursuant to this subsection, and in prescribing regulations pursuant to paragraph (4)(C) of this subsection, the Commission may not base a finding of public interest, convenience, and necessity on the expectation of Federal revenues from the use of a system of competitive bidding under this subsection.

(B) Consideration limited

In prescribing regulations pursuant to paragraph (4)(A) of this subsection, the Commission may not base a finding of public interest, convenience, and necessity solely or predominantly on the expectation of Federal revenues from the use of a system of competitive bidding under this subsection.

(C) Consideration of demand for spectrum not affected

Nothing in this paragraph shall be construed to prevent the Commission from continuing to consider consumer demand for spectrum-based services.

(8) Treatment of revenues

(A) General rule

Except as provided in subparagraph (B), all proceeds from the use of a competitive bidding system under this subsection shall be deposited in the Treasury in accordance with chapter 33 of title 31.

(B) Retention of revenues

Notwithstanding subparagraph (A), the salaries and expenses account of the Commission shall retain as an offsetting collection such sums as may be necessary from such proceeds for the costs of developing and implementing the program required by this subsection. Such offsetting collections shall be available for obligation subject to the terms and conditions of the receiving appropriations account, and shall be deposited in such accounts on a quarterly basis. Any funds appropriated to the Commission for fiscal years 1994 through 1998 for the purpose of assigning licenses using random selection under subsection (i) of this section shall be used by the Commission to implement this subsection.

(9) Use of former Government spectrum

The Commission shall, not later than 5 years after August 10, 1993, issue licenses and permits pursuant to this subsection for the use of bands of frequencies that—

(A) in the aggregate span not less than 10 megahertz; and

(B) have been reassigned from Government use pursuant to part B of the National Telecommunications and Information Administration Organization Act [47 U.S.C. 921 et seq.].

(10) Authority contingent on availability of additional spectrum

(A) Initial conditions

The Commission's authority to issue licenses or permits under this subsection shall not take effect unless—

(i) the Secretary of Commerce has submitted to the Commission the report required by section 113(d)(1) of the National Telecommunications and Information Administration Organization Act [47 U.S.C. 923(d)(1)];

(ii) such report recommends for immediate reallocation bands of frequencies that, in the aggregate, span not less than 50 megahertz;

(iii) such bands of frequencies meet the criteria required by section 113(a) of such Act [47 U.S.C. 923(a)]; and

(iv) the Commission has completed the rulemaking required by section 332(c)(1)(D) of this title.

(B) Subsequent conditions

The Commission's authority to issue licenses or permits under this subsection on and after 2 years after August 10, 1993, shall cease to be effective if—

(i) the Secretary of Commerce has failed to submit the report required by section 113(a) of the National Telecommunications and Information Administration Organization Act [47 U.S.C. 923(a)];

(ii) the President has failed to withdraw and limit assignments of frequencies as required by paragraphs (1) and (2) of section 114(a) of such Act [47 U.S.C. 924(a)];

(iii) the Commission has failed to issue the regulations required by section 115(a) of such Act [47 U.S.C. 925(a)];

(iv) the Commission has failed to complete and submit to Congress, not later than 18 months after August 10, 1993, a study of current and future spectrum needs of State and local government public safety agencies through the year 2010, and a specific plan to ensure that adequate frequencies are made available to public safety licensees; or

(v) the Commission has failed under section 332(c)(3) of this title to grant or deny within the time required by such section any petition that a State has filed within 90 days after August 10, 1993;

until such failure has been corrected.

(11) Termination

The authority of the Commission to grant a license or permit under this subsection shall expire September 30, 1998.

(12) Evaluation

Not later than September 30, 1997, the Commission shall conduct a public inquiry and submit to the Congress a report—

(A) containing a statement of the revenues obtained, and a projection of the future revenues, from the use of competitive bidding systems under this subsection;

(B) describing the methodologies established by the Commission pursuant to paragraphs (3) and (4);

(C) comparing the relative advantages and disadvantages of such methodologies in terms of attaining the objectives described in such paragraphs;

(D) evaluating whether and to what extent—

(i) competitive bidding significantly improved the efficiency and effectiveness of the process for granting radio spectrum licenses;

(ii) competitive bidding facilitated the introduction of new spectrum-based technologies and the entry of new companies into the telecommunications market;

(iii) competitive bidding methodologies have secured prompt delivery of service to rural areas and have adequately addressed the needs of rural spectrum users; and

(iv) small businesses, rural telephone companies, and businesses owned by members of minority groups and women were able to participate successfully in the competitive bidding process; and

(E) recommending any statutory changes that are needed to improve the competitive bidding process.

(13) Recovery of value of public spectrum in connection with pioneer preferences

(A) In general

Notwithstanding paragraph (6)(G), the Commission shall not award licenses pursuant to a preferential treatment accorded by the Commission to persons who make significant contributions to the development of a new telecommunications service or technology, except in accordance with the requirements of this paragraph.

(B) Recovery of value

The Commission shall recover for the public a portion of the value of the public spectrum resource made available to such person by requiring such person, as a condition for receipt of the license, to agree to pay a sum determined by—

(i) identifying the winning bids for the licenses that the Commission determines are most reasonably comparable in terms of bandwidth, scope of service area, usage restrictions, and other technical characteristics to the license awarded to such person, and excluding licenses that the Commission determines are subject to bidding anomalies due to the award of preferential treatment;

(ii) dividing each such winning bid by the population of its service area (hereinafter referred to as the per capita bid amount);

(iii) computing the average of the per capita bid amounts for the licenses identified under clause (i);

(iv) reducing such average amount by 15 percent; and

(v) multiplying the amount determined under clause (iv) by the population of the service area of the license obtained by such person.

(C) Installments permitted

The Commission shall require such person to pay the sum required by subparagraph (B) in a lump sum or in guaranteed installment payments, with or without royalty payments, over a period of not more than 5 years.

(D) Rulemaking on pioneer preferences

Except with respect to pending applications described in clause (iv) of this subparagraph, the Commission shall prescribe regulations specifying the procedures and criteria by which

the Commission will evaluate applications for preferential treatment in its licensing processes (by precluding the filing of mutually exclusive applications) for persons who make significant contributions to the development of a new service or to the development of new technologies that substantially enhance an existing service. Such regulations shall—

(i) specify the procedures and criteria by which the significance of such contributions will be determined, after an opportunity for review and verification by experts in the radio sciences drawn from among persons who are not employees of the Commission or by any applicant for such preferential treatment;

(ii) include such other procedures as may be necessary to prevent unjust enrichment by ensuring that the value of any such contribution justifies any reduction in the amounts paid for comparable licenses under this subsection;

(iii) be prescribed not later than 6 months after December 8, 1994;

(iv) not apply to applications that have been accepted for filing on or before September 1, 1994; and

(v) cease to be effective on the date of the expiration of the Commission's authority under subparagraph (F).

(E) Implementation with respect to pending applications

In applying this paragraph to any broadband licenses in the personal communications service awarded pursuant to the preferential treatment accorded by the Federal Communications Commission in the Third Report and Order in General Docket 90-314 (FCC 93-550, released February 3, 1994)—

(i) the Commission shall not reconsider the award of preferences in such Third Report and Order, and the Commission shall not delay the grant of licenses based on such awards more than 15 days following December 8, 1994, and the award of such preferences and licenses shall not be subject to administrative or judicial review;

(ii) the Commission shall not alter the bandwidth or service areas designated for such licenses in such Third Report and Order;

(iii) except as provided in clause (v), the Commission shall use, as the most reasonably comparable licenses for purposes of subparagraph (B)(i), the broadband licenses in the personal communications service for blocks A and B for the 20 largest markets (ranked by population) in which no applicant has obtained preferential treatment;

(iv) for purposes of subparagraph (C), the Commission shall permit guaranteed

installment payments over a period of 5 years, subject to—

(I) the payment only of interest on unpaid balances during the first 2 years, commencing not later than 30 days after the award of the license (including any preferential treatment used in making such award) is final and no longer subject to administrative or judicial review, except that no such payment shall be required prior to the date of completion of the auction of the comparable licenses described in clause (iii); and

(II) payment of the unpaid balance and interest thereon after the end of such 2 years in accordance with the regulations prescribed by the Commission; and

(v) the Commission shall recover with respect to broadband licenses in the personal communications service an amount under this paragraph that is equal to not less than $400,000,000, and if such amount is less than $400,000,000, the Commission shall recover an amount equal to $400,000,000 by allocating such amount among the holders of such licenses based on the population of the license areas held by each licensee.

The Commission shall not include in any amounts required to be collected under clause

(v) the interest on unpaid balances required to be collected under clause (iv).

(F) Expiration

The authority of the Commission to provide preferential treatment in licensing procedures (by precluding the filing of mutually exclusive applications) to persons who make significant contributions to the development of a new service or to the development of new technologies that substantially enhance an existing service shall expire on September 30, 1998.

(G) Effective date

This paragraph shall be effective on December 8, 1994, and apply to any licenses issued on or after August 1, 1994, by the Federal Communications Commission pursuant to any licensing procedure that provides preferential treatment (by precluding the filing of mutually exclusive applications) to persons who make significant contributions to the development of a new service or to the development of new technologies that substantially enhance an existing service.

5. 47 U.S.C. 309(j) (2000) provides:

§ 309. Application for license

* * * * *

(j) Use of competitive bidding

(1) General authority

If, consistent with the obligations described in paragraph (6)(E), mutually exclusive applications are accepted for any initial license or construction permit, then, except as provided in paragraph (2), the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding that meets the requirements of this subsection.

(2) Exemptions

The competitive bidding authority granted by this subsection shall not apply to licenses or construction permits issued by the Commission—

(A) for public safety radio services, including private internal radio services used by State and local governments and non-government entities and including emergency road services provided by not-for-profit organizations, that—

(i) are used to protect the safety of life, health, or property; and

(ii) are not made commercially available to the public;

(B) for initial licenses or construction permits for digital television service given to existing terrestrial broadcast licensees to replace their analog television service licenses; or

(C) for stations described in section 397(6) of this title.

(3) Design of systems of competitive bidding

For each class of licenses or permits that the Commission grants through the use of a competitive bidding system, the Commission shall, by regulation, establish a competitive bidding methodology. The Commission shall seek to design and test multiple alternative methodologies under appropriate circumstances. The Commission shall, directly or by contract, provide for the design and conduct (for purposes of testing) of competitive bidding using a contingent combinatorial bidding system that permits prospective bidders to bid on combinations or groups of licenses in a single bid and to enter multiple alternative bids within a single bidding round. In identifying classes of licenses and permits to be issued by competitive bidding, in specifying eligibility and other characteristics of such licenses and permits, and in designing the methodologies for use under this subsection, the Commission shall include safeguards to protect the public interest in the use of the spectrum and shall seek to promote the purposes specified in section 151 of this title and the following objectives:

(A) the development and rapid deployment of new technologies, products, and ser-

vices for the benefit of the public, including those residing in rural areas, without administrative or judicial delays;

(B) promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women;

(C) recovery for the public of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource;

(D) efficient and intensive use of the electromagnetic spectrum; and

(E) ensure that, in the scheduling of any competitive bidding under this subsection, an adequate period is allowed—

(i) before issuance of bidding rules, to permit notice and comment on proposed auction procedures; and

(ii) after issuance of bidding rules, to ensure that interested parties have a sufficient time to develop business plans, assess market conditions, and evaluate the availability of equipment for the relevant services.

(4) Contents of regulations

In prescribing regulations pursuant to paragraph (3), the Commission shall—

(A) consider alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments, with or without royalty payments, or other schedules or methods that promote the objectives described in paragraph (3)(B), and combinations of such schedules and methods;

(B) include performance requirements, such as appropriate deadlines and penalties for performance failures, to ensure prompt delivery of service to rural areas, to prevent stockpiling or warehousing of spectrum by licensees or permittees, and to promote investment in and rapid deployment of new technologies and services;

(C) consistent with the public interest, convenience, and necessity, the purposes of this chapter, and the characteristics of the proposed service, prescribe area designations and bandwidth assignments that promote (i) an equitable distribution of licenses and services among geographic areas, (ii) economic opportunity for a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women, and (iii) investment in and rapid deployment of new technologies and services;

(D) ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services, and, for such purposes, consider the use of tax certificates, bidding preferences, and other procedures;

(E) require such transfer disclosures and antitrafficking restrictions and payment schedules as may be necessary to prevent unjust enrichment as a result of the methods employed to issue licenses and permits; and

(F) prescribe methods by which a reasonable reserve price will be required, or a minimum bid will be established, to obtain any license or permit being assigned pursuant to the competitive bidding, unless the Commission determines that such a reserve price or minimum bid is not in the public interest.

(5) Bidder and licensee qualification

No person shall be permitted to participate in a system of competitive bidding pursuant to this subsection unless such bidder submits such information and assurances as the Commission may require to demonstrate that such bidder's application is acceptable for filing. No license shall be granted to an applicant selected pursuant to this subsection unless the Commission determines that the applicant is qualified pursuant to subsection (a) of this section and sections 308(b) and 310 of this title. Consistent with the objectives described in

paragraph (3), the Commission shall, by regulation, prescribe expedited procedures consistent with the procedures authorized by subsection (i)(2) of this section for the resolution of any substantial and material issues of fact concerning qualifications.

(6) Rules of construction

Nothing in this subsection, or in the use of competitive bidding, shall—

(A) alter spectrum allocation criteria and procedures established by the other provisions of this chapter;

(B) limit or otherwise affect the requirements of subsection (h) of this section, section 301, 304, 307, 310, or 606 of this title, or any other provision of this chapter (other than subsections (d)(2) and (e) of this section);

(C) diminish the authority of the Commission under the other provisions of this chapter to regulate or reclaim spectrum licenses;

(D) be construed to convey any rights, including any expectation of renewal of a license, that differ from the rights that apply to other licenses within the same service that were not issued pursuant to this subsection;

(E) be construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service

regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings;

(F) be construed to prohibit the Commission from issuing nationwide, regional, or local licenses or permits;

(G) be construed to prevent the Commission from awarding licenses to those persons who make significant contributions to the development of a new telecommunications service or technology; or

(H) be construed to relieve any applicant for a license or permit of the obligation to pay charges imposed pursuant to section 158 of this title.

(7) Consideration of revenues in public interest determinations

(A) Consideration prohibited

In making a decision pursuant to section 303(c) of this title to assign a band of frequencies to a use for which licenses or permits will be issued pursuant to this subsection, and in prescribing regulations pursuant to paragraph (4)(C) of this subsection, the Commission may not base a finding of public interest, convenience, and necessity on the expectation of Federal revenues from the use of a system of competitive bidding under this subsection.

(B) Consideration limited

In prescribing regulations pursuant to paragraph (4)(A) of this subsection, the Commission may not base a finding of public interest, convenience, and necessity solely or predominantly on the expectation of Federal revenues from the use of a system of competitive bidding under this subsection.

(C) Consideration of demand for spectrum not affected

Nothing in this paragraph shall be construed to prevent the Commission from continuing to consider consumer demand for spectrum-based services.

(8) Treatment of revenues

(A) General rule

Except as provided in subparagraph (B), all proceeds from the use of a competitive bidding system under this subsection shall be deposited in the Treasury in accordance with chapter 33 of title 31.

(B) Retention of revenues

Notwithstanding subparagraph (A), the salaries and expenses account of the Commission shall retain as an offsetting collection such sums as may be necessary from such proceeds for the costs of developing and implementing the program required by this subsection. Such offsetting collections shall be

available for obligation subject to the terms and conditions of the receiving appropriations account, and shall be deposited in such accounts on a quarterly basis. Such offsetting collections are authorized to remain available until expended. No sums may be retained under this subparagraph during any fiscal year beginning after September 30, 1998, if the annual report of the Commission under section 154(k) of this title for the second preceding fiscal year fails to include in the itemized statement required by paragraph (3) of such section a statement of each expenditure made for purposes of conducting competitive bidding under this subsection during such second preceding fiscal year.

(C) Deposit and use of auction escrow accounts

Any deposits the Commission may require for the qualification of any person to bid in a system of competitive bidding pursuant to this subsection shall be deposited in an interest bearing account at a financial institution designated for purposes of this subsection by the Commission (after consultation with the Secretary of the Treasury). Within 45 days following the conclusion of the competitive bidding—

(i) the deposits of successful bidders shall be paid to the Treasury;

(ii) the deposits of unsuccessful bidders shall be returned to such bidders; and

(iii) the interest accrued to the account shall be transferred to the Telecommunications Development Fund established pursuant to section 614 of this title.

(9) Use of former Government spectrum

The Commission shall, not later than 5 years after August 10, 1993, issue licenses and permits pursuant to this subsection for the use of bands of frequencies that—

(A) in the aggregate span not less than 10 megahertz; and

(B) have been reassigned from Government use pursuant to part B of the National Telecommunications and Information Administration Organization Act [47 U.S.C. 921 et seq.].

(10) Authority contingent on availability of additional spectrum

(A) Initial conditions

The Commission's authority to issue licenses or permits under this subsection shall not take effect unless—

(i) the Secretary of Commerce has submitted to the Commission the report required by section 113(d)(1) of the National Telecommunications and Information Administration Organization Act [47 U.S.C. 923(d)(1)];

(ii) such report recommends for immediate reallocation bands of frequencies that, in the aggregate, span not less than 50 megahertz;

(iii) such bands of frequencies meet the criteria required by section 113(a) of such Act [47 U.S.C. 923(a)]; and

(iv) the Commission has completed the rulemaking required by section 332(c)(1)(D) of this title.

(B) Subsequent conditions

The Commission's authority to issue licenses or permits under this subsection on and after 2 years after August 10, 1993, shall cease to be effective if—

(i) the Secretary of Commerce has failed to submit the report required by section 113(a) of the National Telecommunications and Information Administration Organization Act [47 U.S.C. 923(a)];

(ii) the President has failed to withdraw and limit assignments of frequencies as required by paragraphs (1) and (2) of section 114(a) of such Act [47 U.S.C. 924(a)];

(iii) the Commission has failed to issue the regulations required by section 115(a) of such Act [47 U.S.C. 925(a)];

(iv) the Commission has failed to complete and submit to Congress, not later than

18 months after August 10, 1993, a study of current and future spectrum needs of State and local government public safety agencies through the year 2010, and a specific plan to ensure that adequate frequencies are made available to public safety licensees; or

(v) the Commission has failed under section 332(c)(3) of this title to grant or deny within the time required by such section any petition that a State has filed within 90 days after August 10, 1993;

until such failure has been corrected.

(11) Termination

The authority of the Commission to grant a license or permit under this subsection shall expire September 30, 2007.

(12) Evaluation

Not later than September 30, 1997, the Commission shall conduct a public inquiry and submit to the Congress a report—

(A) containing a statement of the revenues obtained, and a projection of the future revenues, from the use of competitive bidding systems under this subsection;

(B) describing the methodologies established by the Commission pursuant to paragraphs (3) and (4);

(C) comparing the relative advantages and disadvantages of such methodologies in terms of attaining the objectives described in such paragraphs;

(D) evaluating whether and to what extent—

(i) competitive bidding significantly improved the efficiency and effectiveness of the process for granting radio spectrum licenses;

(ii) competitive bidding facilitated the introduction of new spectrum-based technologies and the entry of new companies into the telecommunications market;

(iii) competitive bidding methodologies have secured prompt delivery of service to rural areas and have adequately addressed the needs of rural spectrum users; and

(iv) small businesses, rural telephone companies, and businesses owned by members of minority groups and women were able to participate successfully in the competitive bidding process; and

(E) recommending any statutory changes that are needed to improve the competitive bidding process.

(13) Recovery of value of public spectrum in connection with pioneer preferences

(A) In general

Notwithstanding paragraph (6)(G), the Commission shall not award licenses pursuant to a preferential treatment accorded by the Commission to persons who make significant contributions to the development of a new telecommunications service or technology, except in accordance with the requirements of this paragraph.

(B) Recovery of value

The Commission shall recover for the public a portion of the value of the public spectrum resource made available to such person by requiring such person, as a condition for receipt of the license, to agree to pay a sum determined by—

(i) identifying the winning bids for the licenses that the Commission determines are most reasonably comparable in terms of bandwidth, scope of service area, usage restrictions, and other technical characteristics to the license awarded to such person, and excluding licenses that the Commission determines are subject to bidding anomalies due to the award of preferential treatment;

(ii) dividing each such winning bid by the population of its service area (here-

inafter referred to as the per capita bid amount);

(iii) computing the average of the per capita bid amounts for the licenses identified under clause (i);

(iv) reducing such average amount by 15 percent; and

(v) multiplying the amount determined under clause (iv) by the population of the service area of the license obtained by such person.

(C) Installments permitted

The Commission shall require such person to pay the sum required by subparagraph (B) in a lump sum or in guaranteed installment payments, with or without royalty payments, over a period of not more than 5 years.

(D) Rulemaking on pioneer preferences

Except with respect to pending applications described in clause (iv) of this subparagraph, the Commission shall prescribe regulations specifying the procedures and criteria by which the Commission will evaluate applications for preferential treatment in its licensing processes (by precluding the filing of mutually exclusive applications) for persons who make significant contributions to the development of a new service or to the development of new technologies that substantially enhance an existing service. Such regulations shall—

(i) specify the procedures and criteria by which the significance of such contributions will be determined, after an opportunity for review and verification by experts in the radio sciences drawn from among persons who are not employees of the Commission or by any applicant for such preferential treatment;

(ii) include such other procedures as may be necessary to prevent unjust enrichment by ensuring that the value of any such contribution justifies any reduction in the amounts paid for comparable licenses under this subsection;

(iii) be prescribed not later than 6 months after December 8, 1994;

(iv) not apply to applications that have been accepted for filing on or before September 1, 1994; and

(v) cease to be effective on the date of the expiration of the Commission's authority under subparagraph (F).

(E) Implementation with respect to pending applications

In applying this paragraph to any broadband licenses in the personal communications service awarded pursuant to the preferential treatment accorded by the Federal Communications Commission in the Third Report and Order in

General Docket 90-314 (FCC 93-550, released February 3, 1994)—

(i) the Commission shall not reconsider the award of preferences in such Third Report and Order, and the Commission shall not delay the grant of licenses based on such awards more than 15 days following December 8, 1994, and the award of such preferences and licenses shall not be subject to administrative or judicial review;

(ii) the Commission shall not alter the bandwidth or service areas designated for such licenses in such Third Report and Order;

(iii) except as provided in clause (v), the Commission shall use, as the most reasonably comparable licenses for purposes of subparagraph (B)(i), the broadband licenses in the personal communications service for blocks A and B for the 20 largest markets (ranked by population) in which no applicant has obtained preferential treatment;

(iv) for purposes of subparagraph (C), the Commission shall permit guaranteed installment payments over a period of 5 years, subject to—

(I) the payment only of interest on unpaid balances during the first 2 years, commencing not later than 30 days after the award of the license (including any preferential treatment used in making

such award) is final and no longer subject to administrative or judicial review, except that no such payment shall be required prior to the date of completion of the auction of the comparable licenses described in clause (iii); and

(II) payment of the unpaid balance and interest thereon after the end of such 2 years in accordance with the regulations prescribed by the Commission; and

(v) the Commission shall recover with respect to broadband licenses in the personal communications service an amount under this paragraph that is equal to not less than $400,000,000, and if such amount is less than $400,000,000, the Commission shall recover an amount equal to $400,000,000 by allocating such amount among the holders of such licenses based on the population of the license areas held by each licensee.

The Commission shall not include in any amounts required to be collected under clause (v) the interest on unpaid balances required to be collected under clause (iv).

(F) Expiration

The authority of the Commission to provide preferential treatment in licensing procedures (by precluding the filing of mutually exclusive applications) to persons who make significant

contributions to the development of a new service or to the development of new technologies that substantially enhance an existing service shall expire on August 5, 1997.

(G) Effective date

This paragraph shall be effective on December 8, 1994, and apply to any licenses issued on or after August 1, 1994, by the Federal Communications Commission pursuant to any licensing procedure that provides preferential treatment (by precluding the filing of mutually exclusive applications) to persons who make significant contributions to the development of a new service or to the development of new technologies that substantially enhance an existing service.

(14) Auction of recaptured broadcast television spectrum

(A) Limitations on terms of terrestrial television broadcast licenses

A television broadcast license that authorizes analog television service may not be renewed to authorize such service for a period that extends beyond December 31, 2006.

(B) Extension

The Commission shall extend the date described in subparagraph (A) for any station that requests such extension in any television market if the Commission finds that—

(i) one or more of the stations in such market that are licensed to or affiliated with one of the four largest national television networks are not broadcasting a digital television service signal, and the Commission finds that each such station has exercised due diligence and satisfies the conditions for an extension of the Commission's applicable construction deadlines for digital television service in that market;

(ii) digital-to-analog converter technology is not generally available in such market; or

(iii) in any market in which an extension is not available under clause (i) or (ii), 15 percent or more of the television households in such market—

(I) do not subscribe to a multichannel video programming distributor (as defined in section 522 of this title) that carries one of the digital television service programming channels of each of the television stations broadcasting such a channel in such market; and

(II) do not have either—

(a) at least one television receiver capable of receiving the digital television service signals of the television stations licensed in such market; or

(b) at least one television receiver of analog television service signals equipped with digital-to-analog converter technology capable of receiving the digital television service signals of the television stations licensed in such market.

(C) Spectrum reversion and resale

(i) The Commission shall—

(I) ensure that, as licenses for analog television service expire pursuant to subparagraph (A) or (B), each licensee shall cease using electromagnetic spectrum assigned to such service according to the Commission's direction; and

(II) reclaim and organize the electromagnetic spectrum in a manner consistent with the objectives described in paragraph (3) of this subsection.

(ii) Licensees for new services occupying spectrum reclaimed pursuant to clause (i) shall be assigned in accordance with this subsection. The Commission shall complete the assignment of such licenses, and report to the Congress the total revenues from such competitive bidding, by September 30, 2002.

(D) Certain limitations on qualified bidders prohibited

In prescribing any regulations relating to the qualification of bidders for spectrum

reclaimed pursuant to subparagraph (C)(i), the Commission, for any license that may be used for any digital television service where the grade A contour of the station is projected to encompass the entirety of a city with a population in excess of 400,000 (as determined using the 1990 decennial census), shall not—

(i) preclude any party from being a qualified bidder for such spectrum on the basis of—

(I) the Commission's duopoly rule (47 C.F.R. 73.3555(b)); or

(II) the Commission's newspaper cross-ownership rule (47 C.F.R. 73.3555(d)); or

(ii) apply either such rule to preclude such a party that is a winning bidder in a competitive bidding for such spectrum from using such spectrum for digital television service.

6. 47 C.F.R. 1.2110 (1997) provides:

§ 1.2110 Designated entities.

(a) Designated entities are small businesses, businesses owned by members of minority groups and/or women, and rural telephone companies.

(b) *Definitions.*

(1) *Small businesses.* The Commission will establish the definition of a small business on a service-specific basis, taking into consideration the characteristics and capital requirements of the particular service.

(2) *Businesses owned by members of minority groups and/or women.* Unless otherwise provided in rules governing specific services, a business owned by members of minority groups and/or women is one in which minorities and/or women who are U.S. citizens control the applicant, have at least 50.1 percent equity ownership and, in the case of a corporate applicant, a 50.1 percent voting interest. For applicants that are partnerships, every general partner either must be a minority and/or woman (or minorities and/or women) who are U.S. citizens and who individually or together own at least 50.1 percent of the partnership equity, or an entity that is 100 percent owned and controlled by minorities and/or women who are U.S. citizens. The interests of minorities and women are to be calculated on a fully-diluted basis; agreements such as stock options and convertible debentures shall be considered to have a present effect on the power to control an entity and shall be treated as if the rights thereunder already have been fully exercised. However, upon a demonstration that options or conversion rights held by

non-controlling principals will not deprive the minority and female principals of a substantial financial stake in the venture or impair their rights to control the designated entity, a designated entity may seek a waiver of the requirement that the equity of the minority and female principals must be calculated on a fully-diluted basis. Members of minority groups include Blacks, Hispanics, American Indians, Alaskan Natives, Asians, and Pacific Islanders.

(3) *Rural telephone companies.* A rural telephone company is any local exchange carrier including affiliates (as defined in 1.2110(b)(4)), with 100,000 access lines or fewer.

(4) *Affiliate.* (i) An individual or entity is an affiliate of an applicant or of a person holding an attributable interest in an applicant under § 24.709 (both referred to herein as "the applicant") if such individual or entity—

(A) directly or indirectly controls or has the power to control the applicant, or

(B) is directly or indirectly controlled by the applicant, or

(C) is directly or indirectly controlled by a third party or parties that also controls or has the power to control the applicant, or

(D) has an "identity of interest" with the applicant.

(ii) Nature of *control* in determining affiliation.

(A) Every business concern is considered to have one or more parties who directly or indirectly control or

have the power to control it. Control may be affirmative or negative and it is immaterial whether it is exercised so long as the power to control exists.

Example. An applicant owning 50 percent of the voting stock of another concern would have negative power to control such concern since such party can block any action of the other stockholders. Also, the bylaws of a corporation may permit a stockholder with less than 50 percent of the voting stock to block any actions taken by the other stockholders in the other entity. Affiliation exists when the applicant has the power to control a concern while at the same time another person, or persons, are in control of the concern at the will of the party or parties with the power to control.

(B) Control can arise through stock ownership; occupancy of director, officer or key employee positions; contractual or other business relations; or combinations of these and other factors. A key employee is an employee who, because of his/her position in the concern, has a critical influence in or substantive control over the operations or management of the concern.

(C) Control can arise through management positions where a concern's voting stock is so widely distributed that no effective control can be established.

Example. In a corporation where the officers and directors own various size blocks of stock totaling 40 percent of the corporation's voting stock, but no officer or director has a block sufficient to give him or her control or the power to control and the remaining 60 percent is widely distributed with no individual stockholder having a stock interest greater than 10

percent, management has the power to control. If persons with such management control of the other entity are persons with attributable interests in the applicant, the other entity will be deemed an affiliate of the applicant.

(iii) *Identity of interest between and among persons.* Affiliation can arise between or among two or more persons with an identity of interest, such as members of the same family or persons with common investments. In determining if the applicant controls or has the power to control a concern, persons with an identity of interest will be treated as though they were one person.

Example. Two shareholders in Corporation Y each have attributable interests in the same PCS application. While neither shareholder has enough shares to individually control Corporation Y, together they have the power to control Corporation Y. The two shareholders with these common investments (or identity in interest) are treated as though they are one person and Corporation Y would be deemed an affiliate of the applicant.

(A) *Spousal Affiliation.* Both spouses are deemed to own or control or have the power to control interests owned or controlled by either of them, unless they are subject to a legal separation recognized by a court of competent jurisdiction in the United States. In calculating their net worth, investors who are legally separated must include their share of interests in property held jointly with a spouse.

(B) *Kinship Affiliation.* Immediate family members will be presumed to own or control or have the power to control interests owned or controlled by other

immediate family members. In this context *immediate family member* means father, mother, husband, wife, son, daughter, brother, sister, father- or mother-in-law, son- or daughter-in-law, brother- or sister-in-law, step-father or -mother, step-brother or -sister, step-son or -daughter, half brother or sister. This presumption may be rebutted by showing that the family members are estranged, the family ties are remote, or the family members are not closely involved with each other in business matters.

Example. A owns a controlling interest in Corporation X. A's sister-in-law, B, has an attributable interest in a PCS application. Because A and B have a presumptive kinship affiliation, A's interest in Corporation Y is attributable to B, and thus to the applicant, unless B rebuts the presumption with the necessary showing.

(iv) *Affiliation through stock ownership.*

(A) An applicant is presumed to control or have the power to control a concern if he or she owns or controls or has the power to control 50 percent or more of its voting stock.

(B) An applicant is presumed to control or have the power to control a concern even though he or she owns, controls or has the power to control less than 50 percent of the concern's voting stock, if the block of stock he or she owns, controls or has the power to control is large as compared with any other outstanding block of stock.

(C) If two or more persons each owns, controls or has the power to control less than 50 percent of the voting stock of a concern, such minority holdings are equal or approximately equal in size, and the aggregate

of these minority holdings is large as compared with any other stock holding, the presumption arises that each one of these persons individually controls or has the power to control the concern; however, such presumption may be rebutted by a showing that such control or power to control, in fact, does not exist.

(v) *Affiliation arising under stock options, convertible debentures, and agreements to merge.* Stock options, convertible debentures, and agreements to merge (including agreements in principle) are generally considered to have a present effect on the power to control the concern. Therefore, in making a size determination, such options, debentures, and agreements are generally treated as though the rights held thereunder had been exercised. However, an affiliate cannot use such options and debentures to appear to terminate its control over another concern before it actually does so.

Example 1. If company B holds an option to purchase a controlling interest in company A, who holds an attributable interest in a PCS application, the situation is treated as though company B had exercised its rights and had come owner of a controlling interest in company A. The gross revenues of company B must be taken into account in determining the size of the applicant.

Example 2. If a large company, BigCo, holds 70% (70 of 100 outstanding shares) of the voting stock of company A, who holds an attributable interest in a PCS application, and gives a third party, SmallCo, an option to purchase 50 of the 70 shares owned by BigCo, BigCo will be deemed to be an affiliate of company A, and thus the applicant, until SmallCo actually exercises its option to purchase such shares. In order to prevent BigCo

from circumventing the intent of the rule which requires such options to be considered on a fully diluted basis, the option is not considered to have present effect in this case.

Example 3. If company A has entered into an agreement to merge with company B in the future, the situation is treated as though the merger has taken place.

(vi) *Affiliation under voting trusts.*

(A) Stock interests held in trust shall be deemed controlled by any person who holds or shares the power to vote such stock, to any person who has the sole power to sell such stock, and to any person who has the right to revoke the trust at will or to replace the trustee at will.

(B) If a trustee has a familial, personal or extra-trust business relationship to the grantor or the beneficiary, the stock interests held in trust will be deemed controlled by the grantor or beneficiary, as appropriate.

(C) If the primary purpose of a voting trust, or similar agreement, is to separate voting power from beneficial ownership of voting stock for the purpose of shifting control of or the power to control a concern in order that such concern or another concern may meet the Commission's size standards, such voting trust shall not be considered valid for this purpose regardless of whether it is or is not recognized within the appropriate jurisdiction.

(vii) *Affiliation through common management.* Affiliation generally arises where officers, directors, or

key employees serve as the majority or otherwise as the controlling element of the board of directors and/or the management of another entity.

(viii) *Affiliation through common facilities.* Affiliation generally arises where one concern shares office space and/or employees and/or other facilities with another concern, particularly where such concerns are in the same or related industry or field of operations, or where such concerns were formerly affiliated, and through these sharing arrangements one concern has control, or potential control, of the other concern.

(ix) *Affiliation through contractual relationships.* Affiliation generally arises where one concern is dependent upon another concern for contracts and business to such a degree that one concern has control, or potential control, of the other concern.

(x) *Affiliation under joint venture arrangements.*

(A) A joint venture for size determination purposes is an association of concerns and/or individuals, with interests in any degree or proportion, formed by contract, express or implied, to engage in and carry out a single, specific business venture for joint profit for which purpose they combine their efforts, property, money, skill and knowledge, but not on a continuing or permanent basis for conducting business generally. The determination whether an entity is a joint venture is based upon the facts of the business operation, regardless of how the business operation may be designated by the parties involved. An agreement to share profits/losses proportionate to each party's contribution to the business operation is a significant factor

in determining whether the business operation is a [j]oint venture.

(B) The parties to a joint venture are considered to be affiliated with each other.

(c) The Commission may set aside specific licenses for which only eligible designated entities, as specified by the Commission, may bid.

(d) The Commission may permit partitioning of service areas in particular services for eligible designated entities.

(e) The Commission may permit small businesses (including small businesses owned by women, minorities, or rural telephone companies that qualify as small businesses) and other entities determined to be eligible on a service-specific basis, which are high bidders for licenses specified by the Commission, to pay the full amount of their high bids in installments over the term of their licenses pursuant to the following:

(1) Unless otherwise specified, each eligible applicant paying for its license(s) on an installment basis must deposit by wire transfer in the manner specified in § 1.2107(b) sufficient additional funds as are necessary to bring its total deposits to ten (10) percent of its winning bid(s) within ten (10) business days after the Commission has declared it the winning bidder and closed the bidding. Failure to remit the required payment will make the bidder liable to pay penalties pursuant to § 1.2104(g)(2).

(2) Within ten (10) business days of the grant of the license application of a winning bidder eligible for

installment payments, the licensee shall pay another ten (10) percent of the high bid, thereby commencing the eligible licensee's installment payment plan. Failure to remit the required payment will make the bidder liable to pay default payments pursuant to § 1.2104(g)(2).

(3) Upon grant of the license, the Commission will notify each eligible licensee of the terms of its installment payment plan and that it must execute a promissory note and security agreement as a condition of the installment payment plan. Unless other terms are specified in the rules of particular services, such plans will:

(i) Impose interest based on the rate of U.S. Treasury obligations (with maturities closest to the duration of the license term) at the time of licensing;

(ii) Allow installment payments for the full license term;

(iii) Begin with interest-only payments for the first two years; and

(iv) Amortize principal and interest over the remaining term of the license.

(4) A license granted to an eligible entity that elects installment payments shall be conditioned upon the full and timely performance of the licensee's payment obligations under the installment plan.

(i) If an eligible entity making installment payments is more than ninety (90) days delinquent in any payment, it shall be in default.

(ii) Upon default or in anticipation of default of one or more installment payments, a licensee may request that the Commission permit a three to six month grace period, during which no installment payments need be made. In considering whether to grant a request for a grace period, the Commission may consider, among other things, the licensee's payment history, including whether the licensee has defaulted before, how far into the license term the default occurs, the reasons for default, whether the licensee has met construction build-out requirements, the licensee's financial condition, and whether the licensee is seeking a buyer under an authorized distress sale policy. If the Commission grants a request for a grace period, or otherwise approves a restructured payment schedule, interest will continue to accrue and will be amortized over the remaining term of the license.

(iii) Following expiration of any grace period without successful resumption of payment or upon denial of a grace period request, or upon default with no such request submitted, the license will automatically cancel and the Commission will initiate debt collection procedures pursuant to part 1, subpart O.

(f) The Commission may award bidding credits (i.e., payment discounts) to eligible designated entities. Competitive bidding rules applicable to individual services will specify the designated entities eligible for bidding credits, the licenses for which bidding credits are available, the amounts of bidding credits and other procedures.

(g) The Commission may establish different up-front payment requirements for categories of designated entities in competitive bidding rules of particular auctionable services.

(h) The Commission may offer designated entities a combination of the available preferences or additional preferences.

(i) Designated entities must describe on their long-form applications how they satisfy the requirements for eligibility for designated entity status, and must list and summarize on their long-form applications all agreements that effect designated entity status, such as partnership agreements, shareholder agreements, management agreements and other agreements, including oral agreements, which establish that the designated entity will have both *de facto* and *de jure* control of the entity. Such information must be maintained at the licensees' facilities or by their designated agents for the term of the license in order to enable the Commission to audit designated entity eligibility on an ongoing basis.

(j) The Commission may, on a service-specific basis, permit consortia, each member of which individually meets the eligibility requirements, to qualify for any designated entity provisions.

(k) The Commission may, on a service-specific basis, permit publicly-traded companies that are owned by members of minority groups or women to qualify for any designated entity provisions.

7. 47 C.F.R. 1.2110 (1998) provides:

§ 1.2110 Designated entities.

(a) Designated entities are small businesses, businesses owned by members of minority groups and/or women, and rural telephone companies.

(b) *Definitions.*

(1) *Small businesses.* The Commission will establish the definition of a small business on a service-specific basis, taking into consideration the characteristics and capital requirements of the particular service.

(2) *Businesses owned by members of minority groups and/or women.* Unless otherwise provided in rules governing specific services, a business owned by members of minority groups and/or women is one in which minorities and/or women who are U.S. citizens control the applicant, have at least 50.1 percent equity ownership and, in the case of a corporate applicant, a 50.1 percent voting interest. For applicants that are partnerships, every general partner either must be a minority and/or woman (or minorities and/or women) who are U.S. citizens and who individually or together own at least 50.1 percent of the partnership equity, or an entity that is 100 percent owned and controlled by minorities and/or women who are U.S. citizens. The interests of minorities and women are to be calculated on a fully-diluted basis; agreements such as stock options and convertible debentures shall be considered to have a present effect on the power to control an entity and shall be treated as if the rights thereunder already have been fully exercised. However, upon a demonstration that options or conversion rights held by

non-controlling principals will not deprive the minority and female principals of a substantial financial stake in the venture or impair their rights to control the designated entity, a designated entity may seek a waiver of the requirement that the equity of the minority and female principals must be calculated on a fully-diluted basis. The term minority includes individuals of African American, Hispanic-surnamed, American Eskimo, Aleut, American Indian and Asian American extraction.

(3) *Rural telephone companies.* A rural telephone company is any local exchange carrier operating entity to the extent that such entity—

(i) provides common carrier service to any local exchange carrier study area that does not include either

(A) any incorporated place of 10,000 inhabitants or more, or any part thereof, based on the most recently available population statistics of the Bureau of the Census, or

(B) any territory, incorporated or unincorporated, included in an urbanized area, as defined by the Bureau of the Census as of August 10, 1993;

(ii) provides telephone exchange service, including exchange access, to fewer than 50,000 access lines;

(iii) provides telephone exchange service to any local exchange carrier study area with fewer than 100,000 access lines; or

(iv) has less than 15 percent of its access lines in communities of more than 50,000 on the date of enactment of the Telecommunications Act of 1996.

(4) *Affiliate.* (i) An individual or entity is an affiliate of an applicant or of a person holding an attributable interest in an applicant if such individual or entity—

(A) Directly or indirectly controls or has the power to control the applicant, or

(B) Is directly or indirectly controlled by the applicant, or

(C) Is directly or indirectly controlled by a third party or parties that also controls or has the power to control the applicant, or

(D) Has an "identity of interest" with the applicant.

(ii) Nature of control in determining affiliation.

(A) Every business concern is considered to have one or more parties who directly or indirectly control or have the power to control it. Control may be affirmative or negative and it is immaterial whether it is exercised so long as the power to control exists.

Example. An applicant owning 50 percent of the voting stock of another concern would have negative power to control such concern since such party can block any action of the other stockholders. Also, the bylaws of a corporation may permit a stockholder with less than 50 percent of the voting stock to block any actions taken by the other stockholders in the other entity. Affiliation exists when the applicant has the power to control a concern while at the same time another person, or persons, are in control of the concern at the will of the party or parties with the power to control.

(B) Control can arise through stock ownership; occupancy of director, officer or key employee positions; contractual or other business relations; or combinations of these and other factors. A key employee is an employee who, because of his/her position in the concern, has a critical influence in or substantive control over the operations or management of the concern.

(C) Control can arise through management positions where a concern's voting stock is so widely distributed that no effective control can be established.

Example. In a corporation where the officers and directors own various size blocks of stock totaling 40 percent of the corporation's voting stock, but no officer or director has a block sufficient to give him or her control or the power to control and the remaining 60 percent is widely distributed with no individual stockholder having a stock interest greater than 10 percent, management has the power to control. If persons with such management control of the other entity are persons with attributable interests in the applicant, the other entity will be deemed an affiliate of the applicant.

(iii) *Identity of interest between and among persons.* Affiliation can arise between or among two or more persons with an identity of interest, such as members of the same family or persons with common investments. In determining if the applicant controls or has the power to control a concern, persons with an identity of interest will be treated as though they were one person.

Example. Two shareholders in Corporation Y each have attributable interests in the same PCS application. While neither shareholder has enough shares to individually control Corporation Y, together they have the

power to control Corporation Y. The two shareholders with these common investments (or identity in interest) are treated as though they are one person and Corporation Y would be deemed an affiliate of the applicant.

(A) *Spousal affiliation.* Both spouses are deemed to own or control or have the power to control interests owned or controlled by either of them, unless they are subject to a legal separation recognized by a court of competent jurisdiction in the United States. In calculating their net worth, investors who are legally separated must include their share of interests in property held jointly with a spouse.

(B) *Kinship affiliation.* Immediate family members will be presumed to own or control or have the power to control interests owned or controlled by other immediate family members. In this context "immediate family member" means father, mother, husband, wife, son, daughter, brother, sister, father- or mother-in-law, son- or daughter-in-law, brother- or sister-in-law, step-father or -mother, step-brother or -sister, step-son or -daughter, half brother or sister. This presumption may be rebutted by showing that the family members are estranged, the family ties are remote, or the family members are not closely involved with each other in business matters.

Example. A owns a controlling interest in Corporation X. A's sister-in-law, B, has an attributable interest in a PCS application. Because A and B have a presumptive kinship affiliation, A's interest in Corporation Y is attributable to B, and thus to the applicant, unless B rebuts the presumption with the necessary showing.

(iv) *Affiliation through stock ownership.* (A) An applicant is presumed to control or have the power to control a concern if he or she owns or controls or has the power to control 50 percent or more of its voting stock.

(B) An applicant is presumed to control or have the power to control a concern even though he or she owns, controls or has the power to control less than 50 percent of the concern's voting stock, if the block of stock he or she owns, controls or has the power to control is large as compared with any other outstanding block of stock.

(C) If two or more persons each owns, controls or has the power to control less than 50 percent of the voting stock of a concern, such minority holdings are equal or approximately equal in size, and the aggregate of these minority holdings is large as compared with any other stock holding, the presumption arises that each one of these persons individually controls or has the power to control the concern; however, such presumption may be rebutted by a showing that such control or power to control, in fact, does not exist.

(v) *Affiliation arising under stock options, convertible debentures, and agreements to merge.* Stock options, convertible debentures, and agreements to merge (including agreements in principle) are generally considered to have a present effect on the power to control the concern. Therefore, in making a size determination, such options, debentures, and agreements are generally treated as though the rights held thereunder had been exercised. However, an affiliate cannot use such options and debentures to appear to terminate its control over another concern before it actually does so.

Example 1. If company B holds an option to purchase a controlling interest in company A, who holds an attributable interest in a PCS application, the situation is treated as though company B had exercised its rights and had come owner of a controlling interest in company A. The gross revenues of company B must be taken into account in determining the size of the applicant.

Example 2. If a large company, BigCo, holds 70% (70 of 100 outstanding shares) of the voting stock of company A, who holds an attributable interest in a PCS application, and gives a third party, SmallCo, an option to purchase 50 of the 70 shares owned by BigCo, BigCo will be deemed to be an affiliate of company A, and thus the applicant, until SmallCo actually exercises its option to purchase such shares. In order to prevent BigCo from circumventing the intent of the rule which requires such options to be considered on a fully diluted basis, the option is not considered to have present effect in this case.

Example 3. If company A has entered into an agreement to merge with company B in the future, the situation is treated as though the merger has taken place.

(vi) *Affiliation under voting trusts.* (A) Stock interests held in trust shall be deemed controlled by any person who holds or shares the power to vote such stock, to any person who has the sole power to sell such stock, and to any person who has the right to revoke the trust at will or to replace the trustee at will.

(B) If a trustee has a familial, personal or extra-trust business relationship to the grantor or the

beneficiary, the stock interests held in trust will be deemed controlled by the grantor or beneficiary, as appropriate.

(C) If the primary purpose of a voting trust, or similar agreement, is to separate voting power from beneficial ownership of voting stock for the purpose of shifting control of or the power to control a concern in order that such concern or another concern may meet the Commission's size standards, such voting trust shall not be considered valid for this purpose regardless of whether it is or is not recognized within the appropriate jurisdiction.

(vii) *Affiliation through common management.* Affiliation generally arises where officers, directors, or key employees serve as the majority or otherwise as the controlling element of the board of directors and/or the management of another entity.

(viii) *Affiliation through common facilities.* Affiliation generally arises where one concern shares office space and/or employees and/or other facilities with another concern, particularly where such concerns are in the same or related industry or field of operations, or where such concerns were formerly affiliated, and through these sharing arrangements one concern has control, or potential control, of the other concern.

(ix) *Affiliation through contractual relationships.* Affiliation generally arises where one concern is dependent upon another concern for contracts and business to such a degree that one concern has control, or potential control, of the other concern.

(x) *Affiliation under joint venture arrangements.* (A) A joint venture for size determination purposes is an association of concerns and/or individuals, with interests in any degree or proportion, formed by contract, express or implied, to engage in and carry out a single, specific business venture for joint profit for which purpose they combine their efforts, property, money, skill and knowledge, but not on a continuing or permanent basis for conducting business generally. The determination whether an entity is a joint venture is based upon the facts of the business operation, regardless of how the business operation may be designated by the parties involved. An agreement to share profits/losses proportionate to each party's contribution to the business operation is a significant factor in determining whether the business operation is a joint venture.

(B) The parties to a joint venture are considered to be affiliated with each other. Nothing in this subsection shall be construed to define a small business consortium, for purposes of determining status as a designated entity, as a joint venture under attribution standards provided in this section.

(xi) *Exclusion from affiliation coverage.* For purposes of this section, Indian tribes or Alaska Regional or Village Corporations organized pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 *et seq.*), or entities owned and controlled by such tribes or corporations, are not considered affiliates of an applicant (or licensee) that is owned and controlled by such tribes, corporations or entities, and that otherwise complies with the requirements of this section, except that gross revenues derived from gaming activities

conducted by affiliate entities pursuant to the Indian Gaming Regulatory Act (25 U.S.C. 2701 *et seq.*) will be counted in determining such applicant's (or licensee's) compliance with the financial requirements of this section, unless such applicant establishes that it will not receive a substantial unfair competitive advantage because significant legal constraints restrict the applicant's ability to access such gross revenues.

(c) The Commission may set aside specific licenses for which only eligible designated entities, as specified by the Commission, may bid.

(d) The Commission may permit partitioning of service areas in particular services for eligible designated entities.

(e) *Bidding credits.* (1) The Commission may award bidding credits (*i.e.*, payment discounts) to eligible designated entities. Competitive bidding rules applicable to individual services will specify the designated entities eligible for bidding credits, the licenses for which bidding credits are available, the amounts of bidding credits and other procedures.

(2) *Size of bidding credits.* A winning bidder that qualifies as a small business or a consortium of small businesses may use the following bidding credits corresponding to their respective average gross revenues for the preceding 3 years:

(i) Businesses with average gross revenues for the preceding years, 3 years not exceeding $3 million are eligible for bidding credits of 35 percent;

(ii) Businesses with average gross revenues for the preceding years, 3 years not exceeding $15 million are eligible for bidding credits of 25 percent; and

(iii) Businesses with average gross revenues for the preceding years, 3 years not exceeding $40 million are eligible for bidding credits of 15 percent.

(f) *Installment payments.* The Commission may permit small businesses (including small businesses owned by women, minorities, or rural telephone companies that qualify as small businesses) and other entities determined to be eligible on a service-specific basis, which are high bidders for licenses specified by the Commission, to pay the full amount of their high bids in installments over the term of their licenses pursuant to the following:

(1) Unless otherwise specified by public notice, each eligible applicant paying for its license(s) on an installment basis must deposit by wire transfer in the manner specified in § 1.2107(b) sufficient additional funds as are necessary to bring its total deposits to ten (10) percent of its winning bid(s) within ten (10) days after the Commission has declared it the winning bidder and closed the bidding. Failure to remit the required payment will make the bidder liable to pay a default payment pursuant to § 1.2104(g)(2).

(2) Within ten (10) days of the conditional grant of the license application of a winning bidder eligible for installment payments, the licensee shall pay another ten (10) percent of the high bid, thereby commencing the eligible licensee's installment payment plan. If a winning bidder eligible for installment payments fails to submit this additional ten (10) percent of its high bid by

the applicable deadline as specified by the Commission, it will be allowed to make payment within ten (10) business days after the payment deadline, provided that it also pays a late fee equal to five percent of the amount due. When a winning bidder eligible for installment payments fails to submit this additional ten (10) percent of its winning bid, plus the late fee, by the late payment deadline, it is considered to be in default on its license(s) and subject to the applicable default payments. Licenses will be awarded upon the full and timely payment of second down payments and any applicable late fees.

(3) Upon grant of the license, the Commission will notify each eligible licensee of the terms of its installment payment plan and that it must execute a promissory note and security agreement as a condition of the installment payment plan. Unless other terms are specified in the rules of particular services, such plans will:

(i) Impose interest based on the rate of U.S. Treasury obligations (with maturities closest to the duration of the license term) at the time of licensing;

(ii) Allow installment payments for the full license term;

(iii) Begin with interest-only payments for the first two years; and

(iv) Amortize principal and interest over the remaining term of the license.

(4) A license granted to an eligible entity that elects installment payments shall be conditioned upon

the full and timely performance of the licensee's payment obligations under the installment plan.

(i) Any licensee that fails to submit payment on an installment obligation will automatically have an additional ninety (90) days in which to submit its required payment without being considered delinquent. Any licensee making its required payment during this period will be assessed a late payment fee equal to five percent (5%) of the amount of the past due payment. Late fees assessed under this paragraph will accrue on the next business day following the payment due date. Payments made at the close of any grace period will first be applied to satisfy any lender advances as required under each licensee's "Note and Security Agreement." Afterwards, payments will be applied in the following order: late charges, interest charges, principal payments.

(ii) If any licensee fails to make the required payment at the close of the 90-day period set forth in paragraph (i) of this section, the licensee will automatically be provided with a subsequent 90-day grace period, except that no subsequent automatic grace period will be provided for payments from C or F block licensees that are not made within 90 days of the payment resumption date for those licensees, as explained in Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, Order on Reconsideration of the Second Report and Order, WT Docket No. 97-82, FCC 98-46 (rel. Mar. 24, 1998). Any licensee making a required payment during this subsequent period will be assessed a late payment fee equal to ten percent (10%) of the amount of the past due payment.

Licensees shall not be required to submit any form of request in order to take advantage of the initial 90-day non-delinquency period and subsequent automatic 90-day grace period. All licensees that avail themselves of the automatic grace period must pay the required late fee(s), all interest accrued during the non-delinquency and grace periods, and the appropriate scheduled payment with the first payment made following the conclusion of the grace period.

(iii) If an eligible entity making installment payments is more than one hundred and eighty (180) days delinquent in any payment, it shall be in default, except that C and F block licensees shall be in default if their payment due on the payment resumption date, referenced in paragraph (f)(4)(ii) of this section, is more than ninety (90) days delinquent.

(iv) Any eligible entity that submits an installment payment after the due date but fails to pay any late fee, interest or principal at the close of the 90-day non-delinquency period and subsequent automatic grace period, if such a grace period is available, will be deciared in default, its license will automatically cancel, and will be subject to debt collection procedures.

(g) The Commission may establish different up-front payment requirements for categories of designated entities in competitive bidding rules of particular auctionable services.

(h) The Commission may offer designated entities a combination of the available preferences or additional preferences.

(i) Designated entities must describe on their long-form applications how they satisfy the requirements for eligibility for designated entity status, and must list and summarize on their long-form applications all agreements that effect designated entity status, such as partnership agreements, shareholder agreements, management agreements and other agreements, including oral agreements, which establish that the designated entity will have both *de facto* and *de jure* control of the entity. Such information must be maintained at the licensees' facilities or by their designated agents for the term of the license in order to enable the Commission to audit designated entity eligibility on an ongoing basis.

(j) The Commission may, on a service-specific basis, permit consortia, each member of which individually meets the eligibility requirements, to qualify for any designated entity provisions.

(k) The Commission may, on a service-specific basis, permit publicly-traded companies that are owned by members of minority groups or women to qualify for any designated entity provisions.

(l) *Audits.* (1) Applicants and licensees claiming eligibility under this section shall be subject to audits by the Commission, using in-house and contract resources. Selection for audit may be random, on information, or on the basis of other factors.

(2) Consent to such audits is part of the certification included in the short-form application (FCC Form 175). Such consent shall include consent to the audit of the applicant's or licensee's books, documents and other material (including accounting procedures

and practices) regardless of form or type, sufficient to confirm that such applicant's or licensee's representations are, and remain, accurate. Such consent shall include inspection at all reasonable times of the facilities, or parts thereof, engaged in providing and transacting business, or keeping records regarding FCC-licensed service and shall also include consent to the interview of principals, employees, customers and suppliers of the applicant or licensee.

(m) *Gross revenues.* Gross revenues shall mean all income received by an entity, whether earned or passive, before any deductions are made for costs of doing business (e.g., cost of goods sold), as evidenced by audited financial statements for the relevant number of most recently con.pleted calendar years or, if audited financial statements were not prepared on a calendar-year basis, for the most recently completed fiscal years preceding the filing of the applicant's short-form (FCC Form 175). If an entity was not in existence for all or part of the relevant period, gross revenues shall be evidenced by the audited financial statements of the entity's predecessor-in-interest or, if there is no identifiable predecessor-in-interest, unaudited financial statements certified by the applicant as accurate. When an applicant does not otherwise use audited financial statements, its gross revenues may be certified by its chief financial officer or its equivalent and must be prepared in accordance with Generally Accepted Accounting Principles.